

JUNE TERM, 1861.

(AT RALEIGH.)

(179)

AMELIA SMITH against LELAND MARTIN and another.*

1. Where slaves were conveyed to a *feme covert*, by a deed of gift, and the first clause of the conveyance passed the legal estate to her and the heirs of her body, it was *Held*, that a subsequent clause of the conveyance, restraining her husband from all control over said slaves, was inconsistent with the first clause and inoperative, and that the slaves vested in the husband *jure mariti*.
2. *Held further*, that in order to create a separate estate in a *feme covert*, there must be words sufficient to raise a trust for her benefit.

CAUSE removed from the Court of Equity of WILKES.

One Robert Martin, the father of the plaintiff, Amelia Smith, who is a married woman suing by her next friend, conveyed to her a female slave by the following deed:

“STATE OF NORTH CAROLINA—Wilkes County.

“To all whom it may concern, know ye, that for and in con- (180)
sideration of the natural love and affection, and for other good
consideration, hath given and delivered unto my daughter, Amelia
Smith, the wife of Samuel P. Smith, my negro girl, named Dinah, aged
about twenty-one years, a slave, for life, which said negro girl, Dinah,
I bind myself, my heirs, executors, administrators, to warrant and de-
fend unto the said Amelia Smith, and the lawful heirs of her body for-
ever, which said negro, Dinah, with her increase, if any, is not to be at
the disposal of Samuel P. Smith in no manner whatever, but is to re-
main the inheritance of Amelia M. Smith, and the heirs of her body
forever. In witness whereof, I, the said Robert Martin, have hereunto
set my hand and affixed my seal, this 13 March, 1835.

R. MARTIN. (Seal.)

Test: R. C. MARTIN.”

The bill states that the defendant Leland Martin, with full knowledge of the above recited deed, the same having been duly registered, purchased from the husband of the plaintiff a certain slave, one of the increase of Dinah, the slave mentioned in the deed to Mrs. Smith, and holds the same color of a deed from her husband, Samuel P. Smith, and

*This case was decided at the last term of the court and reported, but the MSS. got accidentally misplaced, and was, therefore, omitted.

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the object of the bill is to have the defendant declared a trustee for the plaintiff.

The answer resists the recovery upon the ground that, by force of this deed, the absolute legal estate in this slave passed to Mrs. Smith, and vested in her husband *jure mariti*, and, consequently, the conveyance to the defendant was valid. The cause was set for hearing upon the bill, answer and exhibits, and was transferred to this Court by consent.

Boyden, for the plaintiff.

Barber, for the defendant.

MANLY, J. The equity of the bill depends upon the construction of the deed of Robert Martin, dated 13 March, 1835. The question (181) is, whether that deed creates a trust, in equity, for the separate use of the wife. After an attentive consideration of its contents, we think it does not.

The deed conveys to the *feme covert* the slave in terms appropriate to a common law conveyance of the absolute legal estate. No word is used from which it can be inferred that the property was to be held in trust for her; but, on the contrary, it is signified in the strongest and most direct terms that she was to have the legal estate and the legal control. After thus disposing of it, the declaration is made that said property is not to be at the disposal of her husband in any manner whatever, but is to remain the inheritance of the said *feme* and the heirs of her body forever. The purpose to exclude the husband from a power of disposal is manifest, but this purpose is inconsistent with the previously expressed purpose, equally manifest, that she should have the absolute legal estate. As the husband's responsibility for his wife and children is great, the law invests him with rights in the wife's estate to aid him in meeting this responsibility, and the Courts will not divest him of them upon light grounds.

It seems to us, a constructive trust allowed to have this effect, ought to be raised only in case some word is used to signify an intention to withdraw the property from the woman's absolute legal control and to establish a trust for her, to the exclusion of her husband. To give in terms appropriate and explicit, a legal estate to a married woman, without such word, and then to declare her husband shall not have the disposal of it, is to express inconsistent ideas. Which of them was paramount in the mind of the donor, and, consequently, what was his intention, we do not certainly know. But the obvious inference from the language used is, that he intended his daughter should have the absolute legal estate and control, without the trammels and expense of a trust; and that his son-in-law should not dispose of the same in any manner. The one is as manifest as the other, and these are inconsistent intentions

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which can not stand together. In respect to *wills*, that are construed with more leniency than deeds, we are not aware of any case in which a trust has been held to exist, unless words were used indicating a purpose to make a trust. However inartificial, or wanting in technicalities, some phrase was used from which such an intention was gathered. In the cases in North Carolina to which our attention has been directed, where constructive trusts for married women have been the subjects of consideration, words indicating a purpose to raise a trust (such as use, benefit or trust), have been uniformly employed, with one exception, and the question has not been as to the existence of the purpose, but as to its effect in excluding the husband from participation as a *cestui qui trust*. (182)

The exception referred to is *Ashcraft v. Little*, 39 N. C., 236, where the omission of such words as might indicate a purpose to establish a trust, was lost sight of or postponed to another defect that was fatal to the equity of the will. That case did not turn at all upon the point that is now before us.

In *Margetts v. Barringer*, 10 Eng. Con. Chan., 158, which is relied on by complainants as authority, the words are "*to the sole use*" of the *feme covert*, which distinguishes it from the case before us, and shows an intention to create a trust or use in the property distinct from the legal estate.

We are of opinion, therefore, that while it sufficiently appears the donor of the slave desired to exclude the husband from any right of property in the same, it does not sufficiently appear that he desired or intended to accomplish it by the only mode that could be effectual for that purpose.

The wife took an absolute legal estate in the slave, Dinah, and her increase, and they were subject to the matrimonial rights of the husband.

PER CURIAM.

Bill dismissed with costs.

(183)

SAMUEL FLOYD and others against JOHN B. GILLIAM, Adm'r, and others.

Where a bond was taken from a trustee under an order of the court of equity, payable to the clerk and master, conditioned for the performance of the trust, it was *Held*, that the representative of the *cestui que trust* had no right to sue on such bond without the leave of the court of equity, and that where such unauthorized suit had been begun, the court would enjoin it until an account of the trust could be taken.

CAUSE removed from the Court of Equity of BERTIE.

At the Fall Term, 1851, of the Court of Equity for Bertie, Samuel Floyd was appointed a trustee to perform certain trusts declared by the

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said Court in behalf of one Charles P. Skiles, growing out of a deed theretofore made between said Skiles and James Allen, and he gave bond in the sum of \$4,000, with other plaintiffs in this cause as his sureties, payable to the Clerk and Master in Equity of the said county, conditioned faithfully to perform the said trusts. Skiles died in 1851; up to which time the trustee had acted in the said trust, hiring out negroes, receiving hires, collecting and disbursing funds, and taking care of the person of Skiles, who was quite infirm. The defendant Gilliam having been appointed administrator of the estate of Skiles, without any order or leave from the Court of Equity of Bertie, brought suit on the said bond, and it was to enjoin the continuance of this suit that the bill in this case is filed. The plaintiff submits and prays that an account of the trust may be taken in this Court, and avers that he is fully able to pay whatever sum may be decreed against him, and he insists until he fails to pay and satisfy the decree of the Court, the defendants may be compelled to abstain from urging the suit which they have instituted in the Court of Law.

There is in the answer no material denial of the facts as above stated, but the defendants say that Henry Skiles, a son of the said *cestui qui trust*, is, by the deed set out in the pleadings, interested in the fund (184) therein created, and insists that he should have been made a party to this suit.

The cause was heard on bill and answer.

No counsel appeared for the plaintiff in this Court.

Winston, Jr., for the defendant.

MANLY, J. The bond of the trustee, Floyd, taken by the Court of Equity for Bertie, was a paper of a cause in that Court, and under its control. It was taken on the occasion of Floyd's appointment to the trust of Skile's estate, made payable to the Master, and could only be used by Skiles, or one claiming through him, by leave of the Court. The instrument was designed by the Court as a means of enabling it to enforce the execution of the trust, and should be retained, according to usage, as a security for any sum judicially ascertained to be due from the trustee to this fund. Hence, it was improper for the Master to allow the representative of Skiles, upon his own motion, to take control of the bond, as of a bond payable to his intestate, and sue upon the same. It should have been retained by him subject to the purposes intended, under the control of the Court.

We are of opinion, therefore, upon the filing of the bill by the trustee for an account, it was proper to suspend the prosecution of the suit at law until the account were taken; when, if a balance should be found due to the administrator, the action on the bond could be resorted to for securing its payment.

We do not impugn the general principle heretofore adopted by our Courts, of not staying the *trial* at law, but only the *execution* after judgment. The case before us is excepted from the operation of that principle by the character of the suit, and the instrument sued on. The bond belongs to the office of the Court of Equity, and is under the control of the Court. The Court, therefore, has the power, and ought to have forbid its use whenever the occasion or object is disapproved.

The bill in equity is so manifestly the most appropriate and adequate means of having a settlement of a trust estate, that we think the Court entirely justified in declining to allow the bond and an (185) action upon it at law to be used, primarily, for such purpose. The bond ought to have been regarded only as a security for an ascertained balance. This view steers clear of any conflict with *Williams v. Sadler*, 57 N. C., 378, which has been called to our attention. Ours is not the case of a party litigating a matter both at law and in equity, through rights of proceeding equally open to him. The action at law is upon an office instrument which could not be properly put in suit without leave, and for which leave ought not to have been given in the case in question.

The objection to the bill for the want of a necessary party defendant, viz., Henry Skiles, son of the *cestui qui trust*, we think is untenable. He is sufficiently represented by the administrator, Gilliam.

The equity of the bill for an account is unquestionable, and an account should, accordingly, be ordered. In the meantime, the injunction upon the suit at law should be continued until further order.

PER CURIAM.

Decree for an injunction and account.

JOHN NOOE and another, Adm'rs, and others against JOHN H. VANNOY and others.

The general rule is, that where a testator, after making his will, sells the property given, the legacy is adeemed. But where the *proceeds* of the sale of property are given to children, and the will intimates that the sale is to be made by the testator himself, who does make it, and no substitution or equivalent is made for such legacy, and the proceeds are reinvested, and are traceable, it was *Held*, not to be a case of the ademption of the legacy by a sale of the property.

CAUSE removed from the Court of Equity of WILKES. (186)

The plaintiffs are the administrators with the will annexed of Joel Vannoy, and the bill is filed praying the advice and protection of the Court as to the proper construction of the following clause of the said will, to wit: "I further give to my children by a former marriage,

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the proceeds of the sale of my town property in the town of Wilkesboro, or so much thereof as is herein specified, to wit, to my son Joel Alfred, two hundred dollars; to Elizabeth Caroline Miller, five dollars; to John Hamilton, one hundred dollars; to Rebecca Elvira, formerly married to Welsh, one hundred dollars; to Emily Amanda Welsh, one hundred dollars; to Amelia Adaline Parker, two hundred dollars; to Anne Maria Swink, two hundred dollars; all which legacies are to be chargeable upon my town property and no other."

The plaintiff Nooe married S. M. Vannoy, one of the children by the second marriage. They, with W. W. Vannoy, who is also a son of the second marriage, and the other plaintiffs, who are the children of that marriage, set forth in their bill after the execution of the said will, the testator made a deed of the town property therein mentioned to the said John Nooe, at the price of \$1,300, for which he received the cash, having previously contracted to sell it to said Nooe, and having taken his note for the purchase money, which he then and there surrendered, and they insist that by such sale, the legacy given to the defendants, who are the children of the first marriage, was thereby adeemed and taken away, and that the fund arising from such sale not being disposed of by the will, became distributable among the next of kin of the said Joel, of which they each claim a share with the defendants, and they pray that the administrators may be directed to pay accordingly.

The defendants insist that the legacies to them were not adeemed; that it was the intention of the testator to sell the land himself and give them *the proceeds* of it, and they advert to the fact that the sale is not directed by the will to be made by his executrix. They allege that soon after the payment for the town property was made to him on 3 (187) October, 1857, instead of using the money otherwise, he invested the whole, or greater part of it, in the bonds and notes of other persons, and they file as an exhibit the inventory made by the administrators, from which it appears that the testator left on hand a note on John Nooe for \$200, dated 25 November, 1857; another on John E. Cranor for \$50, dated 27 October, 1857, and another on Wellborn & Rix for \$100, dated 14 October, 1857, besides judgments to the amount of \$100 on other persons, taken subsequently, but which, they insist, were on notes taken shortly after this transaction, and they insist that by these and other concomitant facts, the *proceeds* of the sale of the town property can be distinctly traced and identified, and that by a fair construction of the said provision they are entitled to the legacies aforesaid.

The cause was heard on the bill, answers and exhibits.

Barber, for the plaintiff.

Mitchell, for the defendant.

PEARSON, C. J. When a testator sells the specific property given in a legacy, such legacy is adeemed, for the property does not belong to him at the time of his death. When the will takes effect, there is nothing for it to operate on, and, of course, the legacy must fail. This is the general rule.

But it is unusual for a father to adeem, in this manner, legacies given to children, and exclude them from his contemplated bounty, when there has been no change of circumstances; and for this reason, the Court is slow to adopt the conclusion that there is an ademption, and will seek, anxiously, for some mode of explanation.

In this case, the testator, after making provision for his second wife, and his children by her, gives to his children by a former marriage "the proceeds of the sale of his town property, or so much thereof as is herein specified," viz., \$200 to Joel Alfred, etc., in all \$905. It will be remarked there is no power given to his executrix to sell the town property, but he gives the proceeds of the sale of the property (188) without reference to whether the sale is to be made by himself or by his executrix. So, if at the time the will was executed, he had contracted to sell the property, or had in contemplation a purpose to make sale of it himself, these would be apt words to give the expected "proceeds of the sale"—supposing the will to speak as of the time of its execution. But this will being executed in 1856, comes within the operation of the statute (Act of 1844): "Every will shall be construed with reference to the real and personal estate comprised therein to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will"; Rev. Code, ch. 119, sec. 6.

As the *proceeds of the sale* of the property is given, it follows that if such a part thereof as is specified can be traced out and identified, at the time of the death of the testator, the legacy will take effect, and there will be no ademption, or only a partial one. The distinction between a gift of the property itself, and a gift of the *value* of the property, or the proceeds of the sale of property, is well settled, *Pulsford v. Hunter*, 3 Bro., Ch. 416; 1 Roper on Legacies, 246, where it is said, "The last class of cases to be noticed as not falling within the general rule of ademptions, is where the terms of the bequest are so comprehensive as to include within their compass the fund specifically bequeathed, although it has undergone considerable alteration." He illustrates the exception by supposing the value of certain notes and cash in the hands of B, to be given to C, and afterwards the testator changes the notes and cash by an investment into exchequer bills, bonds or mortgages, which are placed in the hands of B, the exchequer bills, bonds or mortgages will pass, because they answer the specification of the fund in the will.

In our case, comprehensive words of description are used, and at the date of the deed to the plaintiff Nooe, "the proceeds of the sale" were in the hands of the testator as a security, for which he held the note of the said Nooe, the testator at the same time received the proceeds (189) of the sale in money, and if he afterwards invested it, and took as security the notes of other persons, it was not an ademption, because the *corpus*, or thing itself, was not changed, and a second or third collection and reinvestment on other securities would not change it.

It was suggested on the argument that the concluding words of the clause of the will under consideration, viz., "all which legacies are to be chargeable on my town property aforesaid, and no other," qualify the words used in the beginning of the clause, and make the several sums demonstrative pecuniary legacies charged on the town property, and no other, instead of a legacy of the "proceeds of the sale," or so much thereof as is specified in the several sums given.

These two sets of words do show a confusion of ideas, and create difficulty in the construction, but we are satisfied that there is a *gift* of the *proceeds of the sale* of the property, or the parts thereof severally specified. We are led to this conclusion because such is the first and prominent expression, and the concluding words are merely incidental, and are added, not for the purpose of changing the gift, but to prevent it from being extended to any other part of the testator's estate. We adopt this conclusion the more readily because it excludes the effect of an ademption of a legacy to *children*, which is unnatural, unless there has been a change of circumstances, or some other provision or substitution in place of the bounty which was originally intended for them.

An examination of the inventory filed by the plaintiffs Nooe and Vannoy, who are the administrators *de bonis non*, shows that these notes taken by the testator came into their hands, one for \$200, dated 25 November, 1857; one for \$50, dated 27 October, 1857, and one for \$100, dated 14 October, 1857. The dates and other circumstances tend to show that these notes were taken as securities for parts of the proceeds of sale received by the testator at the date of the deed to Nooe, *i. e.*, 3 October, 1857, and to fix their identity. What other notes were on hand at the death of the testator, and went into the hands of (190) the executrix, does not appear, the inventory filed by her not being among the exhibits.

These circumstances, in the opinion of the Court, lay a sufficient foundation for a reference to the Master to enquire whether the proceeds of the sale of the town property, or any part thereof, can be traced out and identified at the time of the death of the testator. In aid of the enquiry, he may examine the plaintiffs Nooe and Vannoy on oath, and

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require the production of books and papers. The cause will stand for further directions.

PER CURIAM.

Decree accordingly.

Cited: Starbuck v. Starbuck, 93 N. C., 187.

SALLIE JONES against CHARLES GEROCK and others.

1. The personal estate, which is in this State, of one residing in another State, in respect to both debts and legacies, must be administered by one qualified to act under the orders and control of our courts and according to our laws, but in regard to the payment of legacies and distributive shares, our courts, from comity, adopt the laws of the domicil.
2. A decree for a distributive share in another State, was *Held*, not to be a bar to a recovery of a distributive share of property lying in this State.
3. The widow of one domiciled in another State, who died intestate, seized and possessed of lands in this State, is entitled to her dower in such lands.
4. Where one, residing in another State, made a will, which was not satisfactory to his widow, who duly entered her dissent on its being offered for probate in that State, and also entered her dissent when it was offered for probate in this State, it was *Held*, that she is entitled to dower and a distributive share of property lying in this State.
5. It was further *Held*, that a decree for dower in another State would be considered as confined to the lands situate in such other State, and as not embracing lands situated in this State.

CAUSE removed from the Court of Equity of JONES.

The bill is filed by the widow of Edward Starkey Jones, of Alabama, who had lands and personal property in the counties of Jones and Onslow, in this State. The bill sets out that the decedent, (191) E. S. Jones, made a will in Alabama, which was duly admitted to probate in Dallas County, in that State, but from which she dissented at the time of its being offered for probate, according to the laws of that State. Afterwards, the said will was duly admitted to probate in the County Court of Onslow, in this State, where a large part of his personal and real estate was situated, and at that term she also dissented from the will of her said husband. The bill is filed against the legatees under the will of E. S. Jones, and against his heirs and next of kin, also against his executors and against the representatives of Richard Jones, a deceased son, who died in the lifetime of the testator, and it prays for dower in the lands lying in this State, and also for an account and a distributive share of the personalty in this State.

The defendants answered severally, but did not deny any of the allegations of fact stated in the bill. They, however, objected to the plaintiff's recovery of dower, as well as her share of the personalty, because the act of Assembly, Revised Code, ch. 118, sec. 1, requires that she must

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"signify her dissent to her husband's will before the County Court of the county wherein she resides," and that as she did not reside in any county in North Carolina, she could not make such dissent at all, and, therefore, could not have her dower or distributive share.

The defendants also objected, and showed, that the plaintiff had filed a bill for, and obtained a decree for, a distributive share of her husband's personal estate in the State of Alabama, and that she is barred by such decree from setting up claim to any further share of his personal property in this State.

It was also objected by the defendants, and the fact was shown to this Court, that the plaintiff had filed a bill and obtained a decree for her dower in her husband's lands in the State of Alabama, and had had the same laid off to her, and they alleged such decree and assignment of dower in bar of her application in this Court.

The parties, by their counsel, filed a written agreement that all errors of form are waived, and the case put upon its merits, and the cause was sent to this Court by consent.

Haughton, for the plaintiff.

McRae and *J. W. Bryan*, for the defendants.

PEARSON, C. J. The rules of pleading and the orderly mode of proceeding and making entries in a cause are intended not merely for the convenience of the parties, so that they may not be taken by surprise, but also for the convenience of the Court, so as to prevent confusion and embarrassment which is apt to occur whenever the regular course of things is departed from. In this case, the objection to the bill on the ground of it being *multifarious*, and because it improperly prays for a division of the slaves and other personal property, instead of an account and settlement of the personal estate, and the difficulties growing out of the vague entries in the transcript, so that the Court can not see whether the case is set for hearing on bill and answers (taking the answers to be admitted), or on bill, answers, *replication* and exhibits, and is left to inference from the manner in which the cause was treated on the argument, that the latter is the manner in which it was intended to be brought to a hearing, may all be met, so far as the parties to this cause are concerned, by the general statement that "all errors of form are waived, and the case is to be put upon its merits," but still this does not answer the purpose of avoiding the danger of confusion, and of relieving the Court from embarrassment in deciding a case where the claim to a distributive share of the personal estate and a claim to dower out of the real estate, are blended together, although the subjects are governed by different principles of law, and the parties are different.

We think it right to call the attention of the gentlemen of the bar to this matter, so that it may not be drawn into a precedent, and a like indulgence be again asked for. Indeed, it was with much (193) hesitation that we concluded to proceed with this case, according to the *construction* we put on the entries made in "the transcript."

1. The *personal estate* which was in this State at the death of the testator, both in respect to the payment of debts and the payment of legacies and distributive shares, must be administered by executors who are qualified by, and act under, the orders and control of the Courts of this State, according to the law of this State, but in regard to the payment of legacies and distributive shares, from comity, our Courts adopt the law of the *domicil*, which, in this instance, is the State of Alabama. The doctrine on this subject is disposed of by the case of *Alvaney v. Powell*, 55 N. C., 51, and the discussion is so full as not to call for any further elaboration of the question. It is set out in the pleadings and admitted, that by the law of that State, a widow who is not satisfactorily provided for by the will of her husband, may enter her dissent, and will, thereupon, be entitled to a distributive share, as in case of intestacy, and the plaintiff has duly entered her dissent according to the requirement of the law, consequently there can be no reason why she shall not receive such distributive share of the personal estate in this State, and to that end, there will be a decree for an account, etc.

It is alleged by the answers that the plaintiff has obtained a decree for her distributive share in the State of Alabama, and is, therefore, barred of any further claim of a distributive share of the property in this State, as she has already been fully satisfied. But we do not understand the decree in the Court of Alabama as embracing any of the personal estate other than that which was in that State. Indeed, it can not be supposed to embrace the personal estate in this State, for, as we have seen, that must be administered under the orders and by the authority of our Courts, and the Court in Alabama had no control over, or concern with it. So, the decree there, in respect to the property there, is not a bar to her right, to have a like decree here, in respect to property here.

2. In respect to real estate situate in this State, we do not, from comity, adopt the law of the domicile, but apply our own laws as (194) to the mode of descent, transfer, devolution and all other particulars. By the common law, a widow was entitled to dower in all the lands and tenements of which her husband was seized *at any time during coverture*, of an estate of inheritance which she might, by possibility, have issue capable of inheriting. By the act of 1784, the right of dower was restricted to such lands and tenements as the husband *died seized and possessed of*. There can be no question that the widow of one

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domiciled in another State is entitled to dower in the lands and tenements situate in this State, of which he was seized and possessed at the time of his death.

When the husband leaves a last will and testament, there is a provision in the act of 1784, under which the widow may enter her dissent and claim dower, and in respect to this provision, the argument stands thus:

If the statute is to be construed *literally*, and applies only to the widows of persons resident in this State, by force of the words, "may signify her dissent thereto before the County Court of the county *wherein she resides*, in open Court, when the will is propounded, or within six months after the probate thereof," it follows, as the provision does not apply to her case, that she is entitled to dower under the general provision, without a dissent, in all the lands and tenements of which her husband was seized and possessed at the time of his death; for the will does not take effect until after his death, and so he dies seized and possessed, notwithstanding any devise or disposition which he may make of such lands and tenements by his will.

If the statute is to receive a *liberal* construction (and this, we suppose, is the true one), so as to make it mean that the widow is to signify her dissent in the County Court where the *will is admitted to probate*, at the time it is propounded, or within six months after the probate thereof, then it applies to the case of a nonresident widow, and it follows that in our case the widow is entitled to dower, because she has signified (195) her dissent in due form in the County Court where the will was admitted to probate, upon the supposition that the provisions in question applies to her. So that, in either way, the plaintiff is entitled to dower according to the prayer of the bill.

If the plaintiff had not entered her dissent in the State of Alabama, but had *taken under the will* the lands devised to her in that State, and had then come here and entered her dissent and claimed dower, we are inclined to the opinion that she would not have been entitled to it, because, having taken *under the will*, she would not be allowed to take against the will here, according to the doctrine established by *Mendenhall v. Mendenhall*, 53 N. C., 287. But as she dissented there, and has also dissented here, and claims against the will in both States, her acts harmonize, and her right seems to be a very clear one.

In regard to the decree which it is alleged she has obtained for her dower in Alabama, and which the answer seeks to set up in bar to her dower in the lands situate here, we must consider it as confined to the lands situate in Alabama, and that the lands in this State were not taken into consideration, so it can not amount to a satisfaction, and is not a bar to the right she now seeks to assert.

There will be a decree for the plaintiff, declaring her entitled to

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dower, and also to an account and distributive share of the personal estate.

PER CURIAM.

Decree accordingly.

Cited: Medley v. Dunlap, 90 N. C., 528; *Pollard v. Slaughter*, 92 N. C., 81; *Syme v. Badger*, *Ib.*, 712; *Efland v. Efland*, 96 N. C., 493; *Smith v. Ingram*, 130 N. C., 104; *Jones v. Layne*, 144 N. C., 602, 612.

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BASIL SAIN against WILLIAM M. DULIN.

Where the answer to a bill for a specific performance of a parol contract to convey land, and in the alternative for compensation for improvements, denies the terms of the contract as set out in the bill, and alleges a different one, which was not performed on account of the improper conduct of the plaintiff, and the defendant also insists on the statute of frauds, it was *Held*, that the plaintiff was not entitled to compensation for value added to the land by such improvements.

CAUSE removed from the Court of Equity of DAVIE.

The plaintiff alleged that the defendant had agreed, by parol, to sell him a certain piece or parcel of land, lying in the said county of Davie, on Dutchman Creek, at the price of \$7.50 per acre, which land is described in plaintiff's bill, and he alleges that, after some disagreement as to one of the lines, they agreed finally as to the limits of the tract, and plaintiff went into possession and kept it for a year; that during that time he built a house on the premises worth \$125, and cleared and otherwise materially added to the value of the land by making other improvements on it; that he held a note on the defendant for over \$300, which it was agreed should be taken up by the defendant as a part of the price of the land; that plaintiff has always been ready and willing to make payment of the remainder of the purchase money, and has offered to do so, but that the defendant, without any plausible excuse for such breach of faith, has sold and conveyed the said land to another. The prayer is for a specific performance of the agreement. "Or if that agreement is not in law valid, and can not be executed," he prays that the defendant be decreed to account with him for the value of the improvements added to the land, and for general relief.

The answer of the defendant sets out that he did make a contract with the plaintiff for a parcel of land at \$7.50 per acre, according to particular boundaries agreed on between them, and he avers that he has been always willing to comply with the agreement, but that the defendant, after such agreement was entered into, insisted upon a boundary altogether different from that agreed on, and became offended with defend-

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ant, and refused to speak to him for some time, and acted in such a manner as to induce him to believe that he would not accept a deed on the real terms of the contract; that the defendant did not offer to give

him up the said \$300 note, nor to pay the remainder of the purchase money, and he admits that he has sold the land to one Gaither.

The defendant insists on the statute of frauds in bar of the plaintiff's claim to relief. The cause was set down for hearing on bill, answer and proofs taken in the cause, and sent to this Court by consent.

Clement, for the plaintiff.

No counsel appeared for the defendant in this Court.

BATTLE, J. The object of the bill is to obtain compensation for improvements, which the plaintiff alleges that he made upon a certain parcel of land, which the defendant had agreed by parol to convey to him. A prayer for specific performance is, indeed, contained in the bill, but the plaintiff, anticipating that such relief could not be had, relies altogether upon the secondary equity for which he sets up a claim. Were the contract which he states admitted by the defendant, but repudiated because of its being by parol, his claim for compensation on account of the value which he added to the land by his improvements, would be clear, as has been long since settled by the leading case of *Albea v. Griffin*, 22 N. C., 9. But the answer denies the contract as set out in the bill, and alleges one which he avers he was willing to have executed, had he not been prevented from doing so by the misconduct of the plaintiff himself. Under these circumstances *Dunn v. Moore*, 38 N. C., 364, is a direct authority against the claim of the plaintiff to any relief at all. In that case it was decided that part performance, as by paying part of the purchase money, and entering into possession and making improvements, will not take the case out of the statute; but when there is such part performance, if the defendant admit the contract as stated by the plaintiff, and also the part performance, but relies on the statute of frauds, the Court will order an account and decree a compensation to the plaintiff for his payments, and for the value which his expenditures have added to the land; but if the contract be denied, the (198) Court can not grant any relief, because it can not go into proof of a contract variant from that which is stated in the answer. The principle thus stated we approve, and it is decisive of the present case against the plaintiff.

Our attention has been called to the cases of *Thomas v. Kyles*, 53 N. C., 302, and *Love v. Neilson*, *Ibid.*, 339, decided at the Morganton Term, 1854, which are supposed to be in opposition to the principle

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extracted from *Dunn v. Moore*. The first would seem to be so, but the part of the case which relates to the present question was comparatively an unimportant one in the cause, and was manifestly not much considered, either by the counsel or the Court. Besides, it does not appear from the report that the alleged contract of purchase for the five acres of land was denied in the answer, it being only stated that "it was not admitted," which, as the main dispute was upon another point, may have meant that the answer had not noticed the allegation of the contract. However this may be, we can not give the case the effect of overruling, or essentially modifying, that of *Dunn v. Moore*. The other case of *Love v. Neilson* came before the Court upon the plea of the statute of frauds in bar of the plaintiff's claim for the specific performance of a parol contract for the purchase of one-half of a mill. The plea was sustained, but the Court said that the plaintiff might have relief for his expenditures in improving the mill-site of the defendant, and to that end remanded the cause to the Court below in order that the defendant might there file his answer. As it could not be known whether the answer would admit or deny the contract set forth by the plaintiff, it was manifest that the decision of the Court is not necessarily opposed to the principle adjudicated in *Dunn v. Moore, supra*.

PER CURIAM.

Bill dismissed with costs.

Cited: Bönham v. Craig, 80 N. C., 231; *McCracken v. McCracken*, 88 N. C., 275, 285; *Luton v. Badham*, 127 N. C., 98, 106.

(199)

JAMES O. MARTIN against C. L. COOK and others.

1. A bill which seeks to rescind a contract in part, without restoring the opposite party to the condition he occupied previously to plaintiff's connection with him, is radically defective.
2. An injunction, except in cases of waste and irreparable injury, is used as an auxiliary only to some primary equity.

CAUSE removed from the Court of Equity of WILKES.

The plaintiff in his bill alleges that the defendant Obadiah Sprinkle was indebted to Jenkins & Roberts, in a bond, for \$1,963, dated 16 March, 1854, and on 27 March, 1855, they took from said Sprinkle a deed of trust (executed to defendant Cook) to secure the same, conveying to said Cook two tracts of land (describing them), also 100 head of hogs, blacksmith's tools, two stills, and other personal property; that on 18 January, 1858, in order to oblige Sprinkle, who was his neighbor, the plaintiff gave Jenkins & Roberts his own bond for \$1,500, and took an assignment of the bond from Sprinkle without recourse to them,

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also an assignment of the deed of trust, likewise without recourse; that said deed of trust was fraudulent and void in law, being intended to enable the said Sprinkle to hinder and delay his creditors; that after making the said deed of trust, judgments were taken in the County Court of Mecklenburg and executions issued under which the said land was sold, and that the personal property conveyed in said deed he has never been able to find.

The bill further alleges that suit has been brought on the bond which he gave Jenkins & Roberts, and judgment taken in the County Court of Davidson, on which execution has issued, and he is threatened with a sale of his property to satisfy the same.

The bill prays for an injunction to restrain the defendants from proceeding to collect the said execution.

The defendants demurred to the bill. There was a joinder in demurrer, and the cause being set down for argument, was sent to this Court.

(200) *Boyden*, for the plaintiff.

Barber, for the defendants.

MANLY, J. The plaintiff's equity for the relief he asks depends upon his willingness to rescind the contract of which he complains, *in toto*, and restore the parties to the condition they occupied previous to their connection with him. This he does not proffer to do, and in this respect the frame of the bill is radically defective.

The *injunction* (except in cases of waste and irreparable injury) is used as an auxiliary only to some primary equity. This primary equity ought to be set forth and insisted upon as the ground of the Court's jurisdiction. The error in the bill is one into which it seems the profession in this State is prone to fall. Their attention has been called to it recently in several cases: *Eborn v. Waldo*, *ante*, 111; *McRae v. R. R.*, 58 N. C., 395; *Scofield v. Van Bokkelen*, *Ibid.*, 342; *Patterson v. Miller*, 57 N. C., 431.

PER CURIAM.

Demurrer sustained and bill dismissed.

THOMAS J. MIMS against DANIEL W. McLEAN, Adm'r of James Kelly.

In the case of a common injunction, where the answer is full, and the plaintiff fails to prove his allegations by any admission in the answer, being without proof, his injunction must be dissolved.

APPEAL from a decretal order made in the Court of Equity of CUMBERLAND.

The plaintiff alleges in his bill that on 1 November, 1851, he executed

to defendant's intestate, James Kelly, a bond for \$500, payable one day after date; that he did not owe Kelly that sum of money, but that the latter had become his security for the purchase of a tract of land, and that this bond was given to cover the contingency of his (201) having to pay for the land; that a few days afterwards, he executed a deed of trust to secure the payment of the bond, and had the same duly registered; that not long afterwards, plaintiff and the said Kelly had a settlement, in which it was agreed that he, Kelly, should keep the land and pay the amount for which he was liable as surety, and that he should give up or cancel the bond for \$500; that accordingly the bond in question was given up to the plaintiff, that, being the son-in-law of the intestate, Kelly, by invitation from him, he removed with his family to his house, and remained there for about a year, and then removed to another place; that the furniture which he carried with him to Kelly's house remained thereafter his family left, and that the bond for \$500 was also left there in an old pine desk, with other papers of the plaintiff; that Kelly has since died, and the defendant having been appointed administrator of his estate, has brought suit against him at law, and having obtained a judgment thereon, has taken out execution and threatens to sell the plaintiff's property. The prayer is for an injunction and for a surrender of the bond, or a release from the judgment at law, and for general relief.

The defendant, in his answer, says that among the valuable papers belonging to the estate of his intestate, he found the bond of \$500, which he urged defendant to pay, but which he abruptly refused to do, simply denying that he owed Kelly anything, without in any manner explaining or accounting for the existence of the bond; that he found the said bond carefully placed away in a trunk, wrapped up in a bundle of other papers, among which was a note on other persons for \$1,000; that he found in an old cheese box a large bundle of papers which he did not consider valuable, but he did not find any of the plaintiff's papers, either there or elsewhere about the intestate's residence, and he has no recollection of ever having seen about the house, or elsewhere, the pine desk described in plaintiff's bill. The defendant does not profess to know of his own knowledge anything of the dealings between (202) the plaintiff and his intestate, but from the foregoing circumstances, and from what he has heard from his intestate, he feels justified in denying the plaintiff's allegations, and holds him to strict proof.

Upon the coming in of the answer, the Court ordered the injunction to be dissolved, from which plaintiff prayed an appeal to this Court.

W. McL. McKay, for the plaintiff.

Leitch, for the defendant.

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PEARSON, C. J. The equity of the plaintiff is put on the ground that the note in question was satisfied in the lifetime of Kelly, the intestate of the defendant; that on a settlement between the plaintiff and Kelly, the note was surrendered up to the plaintiff, and that he neglected to cancel or destroy it, and left it among his other papers at the house of Kelly (who was his father-in-law), "in an old pine desk."

The defendant does not confess the equity of the bill, but denies all of the facts upon which it rests, and says that, according to his belief, they are not true, and as the ground of this belief, among other things, he avers that the note was found by him, at the death of the intestate, carefully wrapped up with other valuable papers and placed away in a trunk, and that there were no papers of the plaintiff found in the house of the intestate, and no "old pine desk" like the one described in the bill. So, if the note ever had been surrendered to the plaintiff, his intestate must have purloined it and put it among his valuable papers, which the defendant does not believe to be true, and, in confirmation of his belief, he avers that after the death of his intestate, he urged complainant to pay the note, "which he abruptly refused to do, simply denying that he owed Kelly anything, without in any manner explaining or accounting for the existence of the note."

The answer being full, and the plaintiff having failed to prove his allegations by an admission in the answer, *he is without proof*, (203) and his injunction is gone. *Capehart v. Mhoon*, 45 N. C., 37.

There is no error in the decretal order dissolving the injunction.

PER CURIAM.

Affirmed.

Cited: Jones v. McKenzie, post, 206; Blackwell v. McElwee, 94 N. C., 429.

NEHEMIAH JONES and others against ROBERT MCKENZIE and ALBERT PEACOCK.

In the case of a common injunction, where the answer is full and responsive to the bill, and the equity is not confessed but denied, the injunction must be dissolved.

THIS was an appeal from a decretal order of the Court of Equity of ROBESON.

The bill was filed by Nehemiah Jones, Arthur Jones and Isham P. Watters, to restrain, by injunction, the collection of a judgment obtained against them. It alleged that the said judgment was founded on a sealed note given by Nehemiah and Arthur Jones, as principals, and Watters as their surety; that the said note was for \$500, and was given in pursuance of a contract which they made with the defendants in October, 1859, to the effect that the said defendants were to deliver to

plaintiffs, the Messrs. Jones, in as good condition as it was at the time of the contract, a turpentine distillery, on the 1st of the ensuing January, which they were to have and use for one year thereafter, to wit, for the year 1860, at the said price of \$500; that previously to 1 January, 1860, and while the said distillery was yet in the possession of the defendants, it was burned and destroyed, with all its furniture and fixtures, as far as it could be burned, and that what could not be burned was rendered worthless and useless for the purposes contemplated in the contract, thus rendering it impossible to fulfill the contract of defendants without rebuilding a distillery in said place, which (204) was not done; neither was any attempt made to deliver the said distillery, and it could not be delivered, and was not; and that during 1860, the defendants had made attempts to sell the *remnants* of the said distillery. Robert McKenzie, one of the defendants, answered that he was, at the time of making the alleged contract, interested in the distillery mentioned in the plaintiff's bill, jointly with the other defendant, Albert Peacock, but that now he is the sole proprietor thereof, and solely interested in the debt sought to be enjoined. He states that he made the contract with the Messrs. Jones for himself and his co-partner, and it is not true, as stated, that the distillery was to be delivered on 1 January in as good condition as it was when the contract was made; that no particular time was specified for the delivery of the premises; that defendant finished using the distillery on 14 December, 1859, and a few days before that gave notice to the plaintiffs that he should cease to use the premises on that day, and that he wished them to take charge of the establishment, as he was about to leave the State on a temporary journey, and that there was no obstacle to their getting possession of it immediately; that it is true that before 1 January, 1860, the distillery did take fire and a partial burning took place, and some injury was done to it, and some of the fixtures were burned; but the defendant positively denies that it was rendered useless and worthless and incapable of delivery, as charged in the bill; on the contrary, he avers that very little injury was done to the still, except to the cap, and that the fixtures around it, which were burned, could be replaced without much trouble or expense. He denies that he tried to sell the distillery, but says he refused to do so because of his contract with the plaintiffs. He says that, for the benefit of the plaintiffs, he authorized an agent, soon after the burning aforesaid, to put the distillery and fixtures in as good condition as they were before the burning, at the cost and expense of the defendants, and he is advised and believes that his said agent was not allowed to do so by the plaintiffs, (205) and so he avers.

On the coming in of the answer, the defendants moved for a dissolution of the injunction, which was refused by his Honor, and an order

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was made to continue it to the hearing, from which the defendants appealed.

No counsel appeared for the plaintiffs in this Court.

Leitch, for the defendants.

PEARSON, C. J. In October, 1859, the plaintiffs made a contract with the defendants to rent a turpentine distillery for one year, to commence on 1 January, 1860, for which they agreed to pay \$500, and to secure the payment thereof, executed a note, under seal, payable nine months thereafter. In December, 1859, a fire occurred, by which the distillery was damaged to some extent. The plaintiffs did not enter and take possession of the distillery, and it was not used during the year 1860. The equity of the bill is put on the ground of a failure of consideration, for that "said distillery, with all its furniture and fixtures, was burned and destroyed as far as it could be burned, and that what could not be burned was rendered worthless and useless for the purposes contemplated in said contract, thus rendering it impossible to fulfill the contract of the defendants without rebuilding the distillery in said place, which was not done, neither was any attempt made to deliver said distillery, and it could not be delivered, and was not."

The answer denies "that the distillery was rendered useless and worthless and incapable of delivery, as charged in the bill, by reason of the fire which occurred," and avers that "very little injury was done to the still, except to the cap of the still; that the fixtures around the still, which were burned, could be replaced without much trouble and expense," and that the defendant McKenzie "authorized an agent soon after the burning aforesaid to put the distillery and fixtures in as good a condition as they were before the burning, at his cost, and he is (206) advised and believes his said agent was not allowed to do so by said plaintiffs, and he so avers."

So, the parties are at issue as to the matters of fact, and in this stage of the proceeding the Court has no means of deciding which gives the true version. It is the plaintiffs' misfortune to have closed the contract by a note, under seal, and the defendants have the advantage, because they have obtained judgment, and have the law on their side. Like *Mims v. McLean*, ante, 200, it is a *common injunction*, and as the answer is full and responsive to the bill, and the equity is not confessed, but is denied, the plaintiffs have no proof, and, consequently, have nothing to stand on in this stage of the cause, and the injunction ought to have been dissolved; *Capehart v. Mhoon*, 45 N. C., 37.

There is error in the decretal order.

PER CURIAM.

Reversed.

Cited: Blackwell v. McElwee, 94 N. C., 429.

MARTHA TILLMAN, Executrix, against RICHARD H. TILLMAN and others.

Where a testator in his will gave a slave to one of his sons, and then provided that should he sell such slave, the proceeds should go into a common fund, and afterwards, by a codicil, made a contingent limitation of the same slave to a daughter in the event of the former legatee's dying without leaving children, and further provided that if any of the slaves bequeathed to the daughter should be sold by him, their value should be made good to her out of his estate, it was *Held*, that, the said slaves having been sold by the testator, the daughter had no claim for its proceeds out of the estate.

CAUSE removed from the Court of Equity of ANSON.

The bill in this case was filed by the executrix of David Tillman, praying the instruction of the Court as to her duties in carrying into execution the will of the said David. The chief difficulty is in relation to the disposition of the proceeds of a slave named (207) Calvin, which was sold by the testator in his lifetime. In the fifth clause of the will he gives Calvin, amongst other slaves, to his son, James A. Tillman. The testator added to his will a codicil, the second clause of which is as follows: "The property which I have given James A. Tillman, in the fifth item of my will, in case he should die without leaving a child or children, I desire to be disposed of in the following manner, to wit, Calvin I give to Mary Ann Smith and her children; Edmund to Frances Cooley and her children, and the balance of the negroes to my three youngest sons, William, David and John. * * * Should I sell any of the negroes given in the fifth item of my will, the proceeds are to go into a common fund."

"Third. In case I should sell and dispose of any of the negroes given to Frances A. Cooley or Mary Ann Smith, either in my will or codicil, it is my wish and desire that the value of said negroes should be paid to them out of my estate."

The only disputed question in the case is as to whether, by the clauses recited, the proceeds of Calvin go to William C. Smith and his wife.

K. P. and R. H. Battle, for the plaintiff.

Ashe, for the defendants.

BATTLE, J. Upon any admissible construction of the will of David Tillman, the proceeds of the slave Calvin must be exempt from the claim of the defendants Smith and wife. That slave was, by the fifth clause of the will, given expressly to the testator's son James, and, by a direction equally express, the testator declared in the second clause of his codicil that should he sell him, his proceeds should "go into a common fund." So far there is no difficulty; but it appears that in the same clause of the codicil, the testator limited Calvin to his daughter, Mrs.

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Smith, and her children, in the event of his son James dying without leaving issue, and in the third clause of the codicil he directed that should he sell any of the negroes given to his daughters, Mrs. (208) Cooley or Mrs. Smith, either in his will or his codicil, the value of such negroes so sold should be repaid to them out of his estate. This direction could certainly have been carried into execution as to any of the slaves given in the will to Mrs. Smith, but it can not apply to Calvin, because he can not be said to have been given to her, either by the will or codicil. By the will, he was given to the testator's son James, and that gift was not taken away by the codicil, but only modified by having engrafted upon it an executory limitation to Mrs. Smith and her children, contingent upon the event of the legatee, James, dying without leaving issue.

But it is contended that by the sale of the slave in question, the legacy to James was adeemed, and it is thence inferred that Mrs. Smith and her children took a present interest in him or his proceeds. This argument will not answer, because if the sale of the slave was an ademption of the legacy as to the legatee James, it must be equally so as to the ulterior legatees, Mrs. Smith and her children. The cases cited by the counsel do not apply, because they were not cases of ademption, but only cases where the death of the legatee for life, in the lifetime of the testator, enabled the ulterior legatees to come into possession of the legacies immediately upon the death of the testator. See *Richardson v. Vanhook*, 38 N. C., 581.

There must be a declaration that the defendants Smith and wife are not entitled to have the proceeds of the slave Calvin, sold by the testator in his lifetime, paid to them out of the estate, and as no other difficulty in the construction of the will is suggested, a decree may be drawn in accordance with the above declaration.

PER CURIAM.

Decree accordingly.

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JAMES S. YARBOROUGH against FREDERICK YARBOROUGH and another.

Where the friends of an infant made an exchange of his slaves for others, and those received in his behalf were carried off by his friends and sold, and he afterwards, without taking any benefit from the arrangement, repudiates it, and recovered in trover for those belonging to him, a court of equity will not interfere to restrain his execution, with the view of compelling him to return the slaves received on his behalf or account for their value.

APPEAL from the Court of Equity of FRANKLIN.

In 1843, Frederick Battle, of Nash County, in this State, by deed of

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gift duly executed, gave to the defendants, Frederick Yarborough and Emily Yarborough (his grandchildren), six slaves, amongst which were the two, Robin and Burton, who are most particularly the subject of this suit. These slaves were in the possession of Thomas E. Yarborough, the defendants' father, in the State of Arkansas, he having been permitted to take them thither by the said Frederick Battle.

The plaintiff having a claim upon certain other slaves which were in the possession of Thomas E. Yarboro, to wit, Lewis, Ailsey and Sarah, went to the State of Arkansas, and was about to bring them back to this State, which (as the bill alleges) was disagreeable to the family of the said Thomas, and particularly to his wife, Mary Ann, who was attached to the slaves about to be removed; therefore, with the advice and concurrence of the parents of the defendants, and other family friends, the plaintiff conveyed to one John L. Gervais all the other slaves given by F. Battle to the defendants, excepting Burton and Robert, to wit, Fanny, Milbury, Owen and Ailsey, also three others not given them, but which were all in the possession of their father, to wit, Ailsey (the elder), Lewis and Sarah, in trust for the benefit and support of the said Thomas E. and his wife, Mary Ann, for their lives, and then to all their children, for whom there were four surviving, including defendants. This deed of trust recites, as a consideration, the brotherly love and affection which the said James S., the plaintiff, has for the said Mary Ann and her children, and the sum of ten dollars (210) cash to him in hand paid; but the real consideration, as set forth in the bill, was the surrender by Thomas E. Yarborough to the plaintiff the two slaves, Robin and Burton, so as aforesaid given to the defendants by their grandfather. These slaves the plaintiff immediately put into the market somewhere in the Southwest, and converted them into money.

The defendants being both very young, not having taken any benefit under this arrangement, nor having been consulted about it, through their maternal uncle, Thomas J. Battle, as their next friend, brought an action of trover in the Superior Court of Franklin County, and recovered as the value of the said slaves, Robin and Burton, \$2,992, with interest and costs. The prayer of the plaintiff is that the defendants be enjoined from taking out execution of this judgment until the slaves Lewis, Ailsey (the elder) and Sarah, shall be surrendered to him, or their value credited on the judgment.

The defendants both answered at length, but the facts set out by them become unimportant from the view taken of the subject by the Court.

On the coming in of the answers, the defendants' counsel moved to dissolve the injunction, which was refused by the Court, and an order made that it be continued to the hearing of the cause, from which the defendants appealed.

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R. B. Gilliam and Miller, for the plaintiff.

B. F. Moore and Lewis, for the defendants.

PEARSON, C. J. We are of opinion that the bill does not show on its face any equity against the defendants, Frederick and Emily, who are the plaintiffs in the action at law, and, consequently, the injunction was improvidently granted.

Suppose an infant sells a negro, receives the purchase money, and spends it, and afterwards avoids the contract by a demand of the negro and a recovery in trover for his value, will a Court of Equity enjoin him from issuing execution, unless he will repay the purchase (211) money, or enter credit for the amount on his judgment? If so, the policy of the law in protecting infants against their supposed want of discretion will be defeated.

Or suppose an infant exchanges negroes, and the negro received by him is sold and carried to parts unknown, and afterwards he avoids the contract by a demand of the negro given by him in exchange and a recovery in trover for his value, will a Court of Equity enjoin him from issuing execution unless he will return the negro received by him, or account for the value? No authority was cited in support of the position, and it is manifest that such an interference by a Court of Equity would, in effect, deprive infants of the protection of the law, and subject them to all the consequences of their want of discretion.

In these cases, it is assumed that the infant is a party to the contract, but in the case made by the bill, waiving the objection that as the deed to Gervais recites for its consideration "brotherly love and affection" and the sum of "ten dollars cash," it is not admissible to add to and contradict the deed by averring that, in point of fact, the real consideration was negroes Robin and Burton, there is no allegation that the infants, Frederick and Emily, were parties to the supposed exchange of negroes, and the amount of it is, that the plaintiff, by an arrangement with the parents and friends of the infants, took Robin and Burton, two negroes belonging to them, and converted them to his own use, and in lieu thereof, and by way of compensation, executed the deed to Gervais, conveying certain other slaves in trust for the parents during her life, and then in trust for their children, including the defendants, Frederick and Emily.

The question is, when Frederick and Emily bring an action of trover against the plaintiff and recover damages for the conversion of Robin and Burton, has the plaintiff an equity to enjoin the collection of the judgment, on the ground that the negroes conveyed by him to Gervais are in the State of Arkansas, where they were at the date of the (212) conveyance, and some of them have been disposed of by the father of Frederick and Emily? In other words, can the legal

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rights of these infants be fettered and embarrassed by reason of an alleged arrangement with their parents—to which they were not parties, which was obviously against their interest—under which they have not acted or taken benefit, and which they repudiated and avoided by instituting their action at law for the conversion of Robin and Burton? A bare statement of the case is the strongest argument that can be made on the part of the infants; because it shows that if equity interposes against them under such circumstances, the protection which the law gives to infants is illusory; and not only so, but that their property may be taken from them without any contract on their part, but simply by force of an understanding among their parents and friends, in respect to which they were too young to be consulted, and under which they have taken no benefit, but, on the contrary, disavow and repudiate it.

There is error in the decretal order by which the injunction was continued until the hearing. The injunction ought to be dissolved.

PER CURIAM.

Reversed.

In the Matter of LEVI S. YATES, Guardian.

Upon the refusal of a bidder at a sale of land by the master, under a decree of court, to comply with his bid, it is not proper, in the first instance, to order a resale of the land, and that the delinquent bidder pay the difference between the former and the latter sales. The proper course is for the master to report the facts to the court, and for the bidder to be put under a rule to show cause why he shall not comply with his contract.

THIS was an appeal from a decretal order made by the Court of Equity of MARTIN.

A petition had been filed by Levi S. Yates, guardian of Sarah (213) E. Moore, for the sale of certain lands lying in Martin County, and a decree of the Court for a sale passed accordingly, to be made by C. B. Hassell, the Clerk and Master of the Court. At the next term of the Court (Spring Term, 1861), the Master reported (among other sales) that he had offered the "Gardner tract" for sale, when A. H. Coffield, for Coffield & Barnhill, had become the last and highest bidder, at the price of \$6,000; that this tract consisted of two parcels, one of which contained two hundred acres, which is described in the report; the other contained one hundred and sixty acres, which was subject to a lease of twenty-four years, of which seventeen years was unexpired. The Master further reported that, after having at first promised to comply with the terms of the sale, the said bidders became dissatisfied with their bid, and after much vacillation, they finally gave him notice that they declined to

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give bond and surety according to the conditions made known by him at the sale. The petitioner, Yates, filed affidavits at this term, going to show the explicit terms on which the sale was made, and that the precise character and quantity of the two parcels were distinctly made known by the Master to A. H. Coffield previously to his making the bid for himself and Barnhill.

The transcript sets out that, at this term, the following order was made in the cause:

"Ordered, that the lands purchased by Coffield, for Coffield and Barnhill, be resold by the Master, and that the purchaser pay the difference, if any, between the first and second sale of it, he, Coffield, having failed to comply with the terms of sale." To which is added the further entry: "From the order and decree of the Court, that the purchasers pay the difference, A. H. Coffield and T. E. Barnhill pray an appeal to the Supreme Court, which is allowed to them by his Honor."

B. F. Moore, for Yates.

Winston, Jr., for Coffield.

(214) PEARSON, C. J. There is error in the decretal order appealed from.

The orderly mode of proceeding was for the Court to accept the bid of Coffield and Barnhill by confirming the contract of sale, and then upon the matter set out in the report, to enter a rule against them, to show cause why they should not be required to comply with the terms of the sale. On the return of the rule, the Court, considering the whole matter, as well the facts set out in the report, as those which might be relied on by them, could dispose of it in one of three ways:

1. By an order that Coffield and Barnhill do execute and perform what they had undertaken to do, according to the terms of their bid, which would, in effect, be a decree for the specific performance of the contract—the Court having jurisdiction to make the decree as an order in the cause, as fully as on "an original bill for specific performance," by reason of the fact that the contract is within its cognizance, and all the necessary parties are before it.

2. By an order releasing Coffield and Barnhill from their bid, rescinding the contract and directing the land to be sold over again.

3. Which is the middle course: By an order without absolutely releasing them from their bid and rescinding the contract, that the land be sold over again, they undertaking, as a condition precedent to this order of resale, which is made for *their* benefit and on the basis of their liability to a decree for a specific performance, to pay the costs and charges incident to a second sale, and also to make good the difference in

IN THE MATTER OF YATES.

the price, in the event that as high a bid is not obtained: *Harding v. Yarbrough* (not reported*), decided at June Term, 1856; see also *Claton v. Glover*, 56 N. C., 371.

*There was no opinion filed by the court in the above case, but as the whole matter appears in the decree filed in the case, and it may be of service to the profession as a precedent, the Reporter takes the liberty of appending such decree as a note to this case.

NORTH CAROLINA, SS.:

Supreme Court, June Term, 1856.

E. L. HARDING v. EDWARD YARBROUGH and others.

July 21, 1856.

Upon the opening of the matter this day before the court, by the counsel for the plaintiff, it was alleged that by an order, in this cause, it was, among other things, ordered that the hotel and premises, in the pleading, in this cause, named, should be sold by E. B. Freeman, as a commissioner of this court, to the best purchaser that could be got for the same, to be allowed of by the said commissioner. That in pursuance of the said order, the said hotel and premises were sold by the said commissioner on 28 June, past, and that Edward Yarbrough and Dabney Cosby, having bid the sum of fifteen thousand dollars for the said hotel and premises, the said commissioner, by his report, allowed the said Edward Yarbrough and Dabney Cosby to be the purchaser thereof, at that sum, which sum, by the terms of the sale, was to be paid in sums as follows, namely, \$500 in cash down; \$4,333 on 1 July, 1857, with interest from the day of sale; \$4,833 on 1 July, 1858, with interest, and \$4,834 on 1 July, 1859, with like interest, and each of said sums of \$4,833 was to be secured by the bond of the purchaser, with approved security. And that the said commissioner, by his said report, had also reported that the said sum so bid was a fair price, and that they had paid down, in cash, the said sum of \$500, to the commissioner, but had failed to give approved security for the payment of the residue of the price aforesaid: whereupon, the court, upon hearing the decretal order for sale of the hotel and premises, made at the last term of this court, and the report of the commissioner aforesaid, on motion of counsel for the plaintiff, there being no objection thereto, doth confirm the sale to the said Dabney Cosby and Edward Yarbrough. And thereupon, it is prayed by the counsel of the plaintiff, that the purchasers aforesaid might, on or before Friday, 25 July, instant, complete their purchase aforesaid, according to the terms of the sale, or on that day show to the court cause to the contrary. And in the event that they do not complete their purchase nor show good cause to the contrary, then, that the said commissioner may be directed forthwith to resell the said hotel and premises, and that all the costs, charges and incidental expenses attending the last sale and incidental thereto, and occasioned by the default of the said Dabney Cosby and Edward Yarbrough, together with any loss or deficiency in price and interest arising by such second sale may be ascertained by the clerk of this court, and the same be paid into the office of this court by the said Cosby and Yarbrough, for the benefit of the parties interested in the premises, according to their several interests. And that service of this order on the said Cosby and Yarbrough be made by the marshal of this court—and in case of the absence of either of them, that service on his attorney be deemed good service—whereupon, upon hearing the counsel for the plaintiff, the decretal order for the sale, made at the last term of this court, and the report of the commissioner aforesaid, this court doth order that notice of this proceeding be forthwith served on the said Cosby and Yarbrough by the marshal of this court, in the manner and according to the prayer of the plaintiff, that they complete their purchase or appear at the time specified and show cause why the prayer of the plaintiff should not be granted.

A true copy.—Test.

E. B. FREEMAN, Clerk.

NORFLEET v. SLADE.

(215) For the error in not pursuing this orderly mode of proceeding, the decretal order must be set aside.

This extends to the whole of the order in respect to the land bid off by Coffield and Barnhill; for, although it was suggested by their counsel that the part of the order which directs resale was not appealed from, still that was incidentally made with reference to the part appealed from, and the whole must be treated as connected together and making but one order, and not two distinct and independent orders, so as to allow the entire subject to come before the Court, and leave all the parties concerned to take such action as they may be advised.

For the purpose of leaving the question entirely open upon its (216) merits, this Court declines to express any opinion as to whether the orders, made in the Court below, do or do not amount to an acceptance of the bid of Coffield and Barnhill, or to a ratification of the contract if the Master exceeded his power; or upon the question whether, supposing the Master to have exceeded his power, Coffield and Barnhill were not at liberty to withdraw their bid at any time before the action of the Master was ratified.

PER CURIAM.

Decretal order reversed.

Cited: In re Gates, post, 307; Evans v. Singeltary, 63 N. C., 206; Etheridge v. Vernoy, 80 N. C., 80; Harris v. Bryant, 83 N. C., 571; Vaughn v. Gooch, 92 N. C., 528.

Modified: Pettillo, ex parte, 80 N. C., 53.

Memorandum: Case in note, Harding v. Yarbrough, cited, post, 308.

WILLIAM NORFLEET and D. P. LLOYD, Executors, against HELEN B. SLADE and others.

1. Where a testator had an estate in land limited over to the defendant on his dying without issue, and he devised the said land to be worked for two years after his death for the payment of his debts, and in his will he gave valuable legacies to the defendant, which she elected to take. it was *Held*, that though the testator died without issue, yet the provision for the payment of the debts must be enforced.
2. Where a testator had derived certain slaves from his maternal grandfather, who had lived in the county of Martin, and it appearing to be a leading purpose with him to restore such slaves to their original place of residence, and to their family connections, he bequeathed to one in Martin as follows: "All my negroes on my Roanoke plantation (which laid in the county of Martin); also, all my negroes on my Edgecombe farms, which I got from Martin County, whether I inherited or purchased them," it was *Held*, that slaves bought by the testator in Martin or elsewhere and removed from that county to Edgecombe, and the children born in Edgecombe of women removed from Martin, and one born of a woman on the Roanoke plantation, but which was casually residing elsewhere, all passed under said bequest.

CAUSE removed from the Court of Equity of EDGECOMBE.

The bill in this case is filed by the executors of Henry S. Lloyd, setting forth difficulties in the way of a satisfactory administration of the estate, and praying that the several disagreeing legatees may come in and litigate the questions made in the case, and that they may be protected by a decree of the Court, as to these several matters of dispute. The bill sets out that the testator owned in Martin County one large tract, called in the will his "Roanoke plantation," which was devised to him by his maternal grandfather, Henry Slade, with a limitation over to his aunts, Helen B. Slade and Mrs. Chloe Hinton, upon his dying without issue, and two other tracts adjoining this, which the testator purchased, the one from William Slade and the other from A. Williams; also, several tracts of land and plantations in Edgecombe County; on the plantations in both of which counties the testator had large numbers of slaves, and other personal property, most of which had been bequeathed to him by his paternal grandfather, Henry Slade, (218) and his maternal grandmother, Mary Gregory.

The testator, being indebted very largely, provided for the payment of his debts as follows: "I authorize and empower my said executors to carry on my farms for the term of two years after my decease, and to adopt all measures for that purpose, if the same be necessary, to pay my debts, and to apply the income thereof as the same may be received, to the payment of my said debts," with a further devise of his town property for the same purpose.

He then proceeds to give and bequeath to his aunt, Helen B. Slade, thus: "all my negroes on my Roanoke plantation; also all my negroes on my Edgecombe farms which I got from Martin County, whether I inherited or purchased them," with a residuary clause to his sister and two brothers. About the year 1858 the testator's grandmother, Mrs. Gregory, having died, and devised to him valuable farms in Edgecombe, the testator removed his residence from Martin County, where he had formerly lived, to the county of Edgecombe, and brought with him a good many of the slaves that had been worked upon the Roanoke farms. The testator died in Philadelphia in January, 1860, and, at the time of his death there were on his Roanoke plantation twenty-seven slaves (which are set forth by name in the plaintiff's bill), all of which slaves were a part of those and their descendants bequeathed to the testator by the said Henry Slade, except one by the name of Weaver, who was bought in Richmond in 1856 and carried to the Roanoke plantation, where he has remained ever since, and never left that plantation. There were thirty-five slaves brought from the Roanoke plantation to Edgecombe, twenty-two of which had been bequeathed to the testator by his grandfather, Henry Slade, or were the descendants of such, and the

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remainder of them, and their increase, were bought by the testator in various counties contiguous, and were taken to the Roanoke plantation; two of these, Anderson and Thrower, were purchased in Martin County.

Four of the slaves on the Edgecombe farms, to wit, Granville, (219) Betsy, Francis and London, were offspring of female slaves removed from Martin to Edgecombe, and born in the latter county.

One of the questions raised, is whether the right and interest of the defendant, Helen, in the said Roanoke plantation, devised to her as aforesaid in remainder by her father, is subject to be used according to the said will of H. S. Lloyd, to pay his debts if necessary.

A further question is as to what slaves pass by the said will to the legatee, Helen B. Slade, whether all the slaves passed that were worked on the Roanoke plantation at the time of testator's death, or only such as were derived from her said grandfather, Henry Slade, and whether the slave, Weaver, the slave purchased in Richmond, passed to her; also, whether Anderson and Thrower, slaves purchased in Martin by the testator and brought to Edgecombe, are included in the bequest to her, the said Helen. Whether Granville, Betsy, Francis and London, the descendants of female slaves brought from Martin and born in Edgecombe County after their removal, pass to Helen B. Slade under the clause in question. Sally was born of a woman which had been given by Henry Slade to the testator, and belonged to the Roanoke plantation. She had been residing among the slaves of the defendant, Helen B. Slade, for a special reason, and was so residing when the testator died; another question is, whether she passed by this clause.

The defendants answered, insisting on their peculiar views of the questions of law governing the construction of the will under consideration, but not disputing any of the facts above stated.

The cause was set down for hearing on the bill, answers and exhibits and sent to this Court by consent.

B. F. Moore, for the plaintiff.

Rodman and Dortch, for the defendants.

MANLY, J. The bill is filed for the construction of the will of Henry S. Lloyd in certain particulars. Upon a consideration of the (220) will, in connection with the first and principal point upon which the advice of the Court is asked it seems to us clear that the testator expected and intended all the plantations worked by him to be continued in cultivation two years, for the payment of his debts, and so far as this is practicable and consistent with the rights of others, it ought to be carried into execution. With respect to the Roanoke plantation,

it appears from the will of Henry Slade to be devised to the testator, Lloyd, with a limitation over, in the case of his death without issue, to Helen B. Slade and Chloe Hinton. The death of Lloyd without issue, as stated in the pleadings, vests the rights of property and possession immediately in the devisees in remainder, and with this result we can not interfere so far as Mrs. Hinton is concerned. But, inasmuch as Miss Slade receives a large estate, real and personal, under the will, she is bound to carry out, even to the prejudice of her rights, the manifest purpose of the testator in respect to his Roanoke plantation. This is upon a principle of equity that a legatee who elects to take under the will, must do so subject to all the provisions of the instrument that affects his interest. He can not accept the good and repudiate the bad. The Court is of opinion, therefore, that the profits of the Roanoke plantation, with the others, should be appropriated for two years, if necessary, to pay the debts of the estate, subject to the right of Mrs. Hinton to a proper rent for her interest in the same. It will follow that slaves given to Miss Slade must also be taken by her, subject to the incumbrance of working to pay debts for two years, if necessary. The bequest to Helen B. Slade is in the following words: "And I also give and bequeath to my said Aunt Helen all my negroes on my Roanoke plantation, also all my negroes on my Edgecombe farms which I got from Martin County, whether I inherited or purchased them." The bequest embraces, as we think, all the slaves that were at the time worked upon the Roanoke farm, without regard to the source from which they were derived. It, consequently, includes Weaver, who was purchased in Richmond and put to labor on the Roanoke farm. The child, Sally, is also (221) included, for, although being at the time among the slaves of his aunt, at her residence, the child was born on the Roanoke plantation of a mother belonging to that estate, and was removed for a special reason and purpose only. It was not permanently settled or fixed at the plantation of the aunt and, consequently, had not lost the domicile of its birth. It is to be regarded, therefore, as one of the negroes on the Roanoke plantation.

Considering the other clause of this bequest, we are of the opinion that all the slaves on the Edgecombe farms which had been *removed* to them from Martin, no matter how or from what quarter derived, pass under the bequest, also the slaves on the Edgecombe farms which had been bought in Martin. This will include Anderson and Thrower.

The children, Granville, Betsy, Francis and London, appear to be offspring of slaves removed from Martin to Edgecombe, but born in the latter county. While the testator is making provision to restore the slaves to their original places of residence, and to their family connections, it would be an inconsistent and harsh construction to hold that

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he intended to separate infant children from their mothers. We think it was intended the children should go with their mothers, and, consequently, they are embraced in the bequest to Miss Slade.

PER CURIAM.

Decree accordingly.

(222)

JAMES ADAMS, Ex'r, against MARTHA A. JONES and others.

1. The words, "wheat and corn on hand," in a will, were *Held*, to mean that, only, which was in the granaries of the testator at the time of his death, and not to embrace the ungathered or standing crop.
2. The court will not respond, at the instance of an executor, as to the conflicting interests of two legatees of land; as the executor has nothing to do with the question. The court also will decline to answer as to a hypothetical case.
3. Stock in a railroad company is embraced in the term *property*, directed by the will to be sold.
4. A deposit in a bank is not to be considered as included among *debts* ordered by the will to be *collected* and invested for the benefit of legatees, especially before a demand and refusal, on the part of the bank, to pay.

CAUSE removed from the Court of Equity of WAKE.

The bill in this case was filed by the executor of Austin Jones to obtain a construction of certain clauses of his will and codicil, and the several legatees were made parties defendants.

In clause 8, the testator bequeathed to his widow, Martha A. Jones, "all the wheat on hand, all the corn on hand, also all the bacon and lard on hand."

At the date of the death of the testator, some of the highland corn was ripe enough to be housed, but the lowland corn, which composed more than three-fourths of his corn crop, was not ripe enough to be gathered. There was on hand at this date about thirty barrels of *old corn*, and a much larger quantity at the time of the making of the will.

The question propounded is, whether the ungathered corn passes under this bequest; also whether a share of railroad stock is included in the meaning of the word "property" in a clause directing a sale.

The bill states a controversy between the widow and one of the other legatees as to the respective rights of the two in a tract of land devised in the will, but from the view taken of the question by the Court it is not necessary to be particularly stated.

The executor also seeks to be informed, "when will the liability to make up for the loss of the slaves, by death, cease." No case of the loss of slaves had occurred among the legatees at the filing of the bill.

At the time of the death of the testator there was to his credit, in a branch of the Bank of Cape Fear, \$900, for which he had a cer-

tificate of deposit. The executor desires to be instructed whether (223) this deposit is a *debt* due to the estate of the testator, and, as such, coming within a direction to collect debts and invest the proceeds for the benefit of his minor children, or is to be considered as cash.

Phillips and *K. P. Battle*, for the plaintiff.

Miller, for the defendants.

MANLY, J. The bill is filed to obtain a construction of the will of Austin Jones in certain matters of doubt, and for an account and settlement of the estate.

Taking these matters in the order in which they are brought to the attention of the Court, we are of opinion, in the first place, that by the term, "wheat and corn on hand," is meant that only which was in the granaries of the testator at the time of his death. The terms used are not those commonly resorted to to designate growing crops or standing grain. The words crop, or growing crop, or standing crop, are those in popular use for such purpose. The force of the expression, "on hand," also leads to the conclusion that one who uses it has reference only to such things as are capable of present delivery.

In the second place, the Court declines expressing any opinion as to the controversy between the widow and the legatee, Turner, about the eighty acres of land. It is a matter which does not concern the executor in the settlement of the estate. The parties interested must settle it themselves, in such way as they may be advised is necessary and best.

The third enquiry the Court also declines answering, for the reason that it is hypothetical. No one of the negroes given to any of his children has died, and, therefore, the contingency has not arisen upon which alone the construction of the ninth clause of the will can become of any practical utility.

The share of stock in the Raleigh and Gaston Railroad Company is *property* to be sold under the eleventh clause of the will. The word is among the most comprehensive of those in use to signify (224) things which are owned, and subject to be owned and enjoyed.

The deposit of \$900 in the Cape Fear Bank is not embraced, according to our opinion, among the debts which are directed in the eleventh clause of the will to be collected and invested for the benefit of his children.

We deem it unnecessary to discuss or decide, in this connection, the precise legal relations which subsist between a general depositor and a bank. Our duty is to ascertain the meaning of the testator, in the language employed by him in the clause in question, and the true rule is to interpret it according to its ordinary acceptation. The common understanding, we think, is to regard a deposit in the bank as *cash*

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(at any rate prior to a demand and refusal), and not as a debt due. In making out a descriptive list of one's estate, it would be certainly so classed. We conclude, therefore, the testator did not intend to embrace the bank deposit by the use of such words as "all the debts due me."

Let an account conforming to these views be ordered.

PER CURIAM.

Decree accordingly.

Cited: Redmond v. Commissioners, 106 N. C., 140.

(225)

WILLIAM BALLANTYNE, Executor, against CHARITY TURNER and others.

1. Where a testator gave directions in his will, that his wife should "put out his money and take security for it," it was *Held*, that the executor was not bound or authorized to interfere with the widow in the investment and management of the fund.
2. Where there were two persons of the same name, mentioned in a will, the one a granddaughter, to whom a small legacy was given, and the other a daughter, to whom a larger portion is given in a clause with two others, daughters, it was *Held*, that the daughter was meant in such bequest.
3. A wish expressed at the conclusion of a will that if the testator had not provided his wife with a plentiful support she was to have enough of the interest of his money to make her such plentiful support, was *Held*, too vague and indefinite to impose any duty on the executor.
4. Interest, on a legacy, as a general rule, is only chargeable from the time the legacy is ordered to be paid.

CAUSE removed from the Court of Equity of WAKE.

The bill is filed by the executor of Augustine Turner, praying the Court for a construction of certain clauses in the will, and stating that there are conflicting claims set up by the different legatees, an erroneous decision of which, on his part, might subject him to great pecuniary loss.

The first question presented to the Court is, whether the executor is responsible under a clause directing his wife "to put the balance of his money into safe hands and take security for the benefit of his children hereafter named," or whether the wife was to be the sole judge of the sufficiency of the security taken by her.

The second and third questions, for the reasons stated by the Court, are immaterial.

The fourth question arises on this clause, "My will is that my executor give my grandson, Augustine Perry, when he becomes of age, or put in a guardian's hands for his benefit, the sum of one thousand dollars, * * * and after my said wife's death or marriage, I wish the executors to sell all the property loaned to my wife and not heretofore given away, and equally divide it between Mary Turner, Cynthia Perry, and

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Nancy Turner, except my will is that Cynthia Perry have \$1,000 less of the amount of property, sold at my wife's death, than Mary Turner and Nancy Turner, on account of the thousand dollars given to Augustine Perry." The executor seeks to know at what time this one thousand dollars becomes payable to Augustine Perry, whether it goes at once into the hands of the guardian or whether it is to be postponed until he arrives at age, or at the death of his grandmother, and whether the said legacy bears interest. The said Augustine Perry had lived with and been supported by his own father, and had never been under the charge of his grandfather. In the former part of the will the sum of (226) \$400 per annum is given to his wife during her life, to be derived from the interest of his money, and it is alleged in the bill that, after the payment of debts and specific legacies, there will not be enough of money left to pay the annuity of \$400, and the said thousand dollars to Augustine Perry, if it becomes payable before her death; and another question is, what shall be done in case this conflict occurs?

The fifth question arises upon the fact that there are two persons by the name of Nancy Turner, mentioned in the testator's will, to wit, a daughter and a granddaughter, the daughter of his son, Henry Turner, to whom he gives \$500, and a daughter, Nancy Turner, mentioned in the before recited clause. The executor desires to know whether this legacy is void, for the ambiguity, or to which individual of that name he is to pay the money arising from the sale as aforesaid ordered.

6. The testator, in his will, requires that a certain negro given to one of his daughters, Mrs. Avery, shall be returned to his estate, if she should die "without a bodily heir," and be sold, and the proceeds divided among his living children. The executor desires to know when this legacy will become vested, and how soon after the contingency, referred to, will it be his duty to make the contemplated sale.

At the close of the will are these words: "If I have not given my wife a plentiful support, she is to have enough of the interest of said money to make her a plentiful support." The executor desires to know whether he is to judge whether the provisions of the will are sufficient, or whether he will be held responsible for the fulfillment of the clause.

K. P. Battle for the plaintiff.

No counsel for the defendants in this Court.

BATTLE, J. The bill is filed by the plaintiff as executor of Augustine Turner, deceased, for the purpose of obtaining the advice and direction of the Court as to the proper construction of his testator's will and the management of his estate. To such of the enquiries as (227)

it is necessary for us to respond at the present time we will give answers in the order in which the questions are put:

1. We find nothing in the will which requires the executor to interfere with the widow in the investment and management of the balance of the money mentioned in the seventh clause. The testator having entrusted her with that business she must be the exclusive judge of the sufficiency of the security upon which the loans are to be made.

2 and 3. We cannot discover any interest which the executor has in knowing what estate the respective husbands of Winifred Avery and Martha Spence take in the slaves given to their wives. He is not constituted by the will a trustee for the *femes covert*, nor are the slaves given for their separate use.

4. The legacy of \$1,000 to the testator's grandson, Augustine Perry, is, upon a proper construction of the different clauses of the will relating to it, made payable to him either upon his coming of full age or at the death of his grandmother, should she die before he arrives at that age. The testator first directs his executor to pay it to him "when he becomes of age," but he immediately adds, "or put in a guardian's hands for his benefit," which seems to be inconsistent with the first direction; this, however, is explained by the clause which, after ordering a sale at the widow's death of the property given her for life, directs the proceeds to be equally divided between the testator's three daughters, Mary Turner, Cynthia Perry, and Nancy Turner, with the exception that Cynthia is to have \$1,000 less than the other two, on account of that sum being given to her son, Augustine. This is a clear indication that the latter is to have his legacy before he comes of age, provided his grandmother dies before that time, and, in that event, the money must be paid to his guardian, as directed by the will. As it does not appear from the will

that the testator was standing in *loco parentis* to his grandson, (228) and as it does appear from the bill that the grandson had always

lived with and been supported by his own father, the legacy will, according to the general rule, bear interest only from the time when it becomes payable. *Harrell v. Davenport*, 58 N. C., 4. The legatee is stated to be only eight years of age, and as the interest on his legacy can not commence before his arrival at full age, or the death of his grandmother, we are not informed that it can interfere with the annuity of \$400 given to her, and it is, therefore, unnecessary for us to speculate upon the effect which might have resulted from a collision between that annuity and the immediate payment of the legacy, or of interest upon it.

5. The proceeds of the sale of the property given to the widow for life are, at her death, to be equally divided "between Mary Turner, Cynthia Perry, and Nancy Turner," and the testator has mentioned in his will two persons of the name of Nancy Turner, one of whom is his

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daughter and the other is his granddaughter, and the question is, whether the legacy is void because of a patent ambiguity. The answer is that if there were a patent ambiguity the legacy would be void, but the apparent difficulty is removed by the fact that, in the bequest under consideration, Nancy Turner is named in connection with the testator's daughters, Mary Turner and Cynthia Perry, which makes it manifest that the legatee spoken of is the daughter and not the granddaughter of the testator, and the maxim, *noscitur a sociis*, gives the legacy to her.

6. It is very doubtful whether the female slave lent to the testator's daughter, Winifred Avery, will, under the limitation contained in the will, ever return to and become again a part of his estate; but if she should, it will then be the proper time to decide what will be done with her.

7. The widow, not having shown any dissatisfaction with the express provision made for her by her husband's will, by dissenting from it, can not claim any additional support under the general terms which he uses in the latter part of it. Such terms are too vague and indefinite to be carried into effect by a judicial sentence. See *Faribault v. (229) Taylor*, 58 N. C., 219.

A decree drawn in accordance with the principles announced in this opinion will probably enable the plaintiff to settle the estate of his testator without further difficulty. The costs will be paid out of the estate.

PER CURIAM.

Decree accordingly.

JOHN A. RICHARDSON against BERRY GODWIN.

1. Where an insufficient description was given in a bond to make title, parol evidence cannot be resorted to to show what the parties meant, or to identify the particular parcel of land which was the subject matter of the written contract.
2. Where an obligee in a bond to make title, files a bill for a specific performance of the contract, and claims to have the land conveyed according to certain boundaries which he alleges were meant by the contract, and the defendant in his answer denies that such boundaries were meant, and sets out others which he alleges were intended, the plaintiff, not having in the pleadings averred his unwillingness to accept a deed according to the lines as the defendant says he understood they were to be run, and not having offered to release him against any further claim, is not entitled to a decree according to the allegations of the defendant.

CAUSE removed from the Court of Equity of ROBESON.

The bill was filed by the plaintiff to enforce a specific performance of a contract in writing for the conveyance of a certain parcel of land according to particular lines which are set forth in the bill, and plaintiff avers were the lines intended by the agreement. The land in question

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was part of a contract of some four thousand acres which was owned by the plaintiff, and the contract is for the conveyance of a part thereof, supposed to be about fourteen hundred acres, "the location of which will more fully appear by reference to a certain plat now in the hands of

Berry Godwin, made by Elias Wishart," which plat is made a (230) part of the plaintiff's bill. The plat in question exhibits three lines drawn across the body of the land, two of which the plaintiff alleges were drawn by Eli Wishart, and the one which is east of the other he contends was meant by the parties, and he prays that the defendant may be compelled to convey according to that boundary.

The defendant in his answer says that when the plaintiff and himself entered into the contract set out (which he does not deny) they drew a third line on the plat, formerly made by Wishart, which is still more easterly, and that *that* was the line, according to which the land was to be conveyed, and according to which he says he had always been ready and willing to convey, but had not done so because of the unreasonable and unjust claim set up by the plaintiff, to have the land conveyed according to the middle line.

There were proofs taken on both sides as to the acts and declarations, of the parties, in respect to the line intended, but being pronounced by the Court inadmissible to control the meaning of the bond, they are not deemed proper to be reported.

The plaintiff contended on the argument that he was at least entitled to have a conveyance according to the allegations of the defendant, and proposed *ore tenus* to take a decree on these terms, if the Court were of opinion that he had not established his enquiry according to his own allegations and proofs.

Leitch for the plaintiff.

Person for the defendant.

PEARSON, C. J. A specific performance of the contract can not be decreed, because it is not *practicable*, by reason of the vague and indefinite description of the parcel of land concerning which the contract was made. It is settled that where an insufficient description is given, parol evidence is not admissible to show what the parties meant, or to

identify the particular parcel of land which was the subject-matter (231) of the written contract. This must be done by the terms of the contract, and an insufficient description cannot be added to or helped out by parol proof of what was said before, at the time of after the written contract was executed. *Murdock v. Anderson*, 57 N. C., 77; *Allen v. Chambers*, 39 N. C., 125.

Whether the plaintiff is entitled to a specific performance, according to the contract, as the defendant in his answer says the line ought to run,

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is a question not presented by the pleadings. In order to raise it, the plaintiff must aver that he is willing and has offered to accept a deed for the land according to the line, as the defendant says he understood it was to be run, and that he, the plaintiff, has offered to perform his part of the contract as it was understood to be by the defendant, and to release and acquit him of all further claim. The bill is dismissed with costs, but without prejudice.

PER CURIAM.

Bill dismissed.

Cited: Braid v. Munger, 88 N. C., 299.

JOSEPH WHITE and others against WILLIAM S. BUTCHER and others.

1. The maxim, that equity will not enforce the specific performance of an agreement upon which an action will not lie, at law, for damages, never meant more than that the contract must be such as the law would have recognized, if sued on in proper time and under proper circumstances.
2. One who has executed a bond to make title to land, has no right to insist, in a suit for a specific performance, that the defendant had abandoned his right to relief, while he still holds the bonds given for the purchase money, and has never made an offer to surrender them to his vendee.

CAUSE removed from the Court of Equity of SURRY.

The bill was filed for the specific performance of a contract, in writing, executed by the defendant, Butcher, in the year 1851, in which the defendant binds himself in a penalty, and after reciting that three several bonds had been executed by the plaintiff as the price of (232) the land therein described, which fell due at three several dates, it is provided as follows: "Now, if the said Joseph White shall pay off the said bonds as they fall due, then, when the last of the said payments shall be paid, the said William S. Butcher shall personally, or by his agent or attorney, execute to the said Joseph White, his heirs or assigns, a good and sufficient title deed in fee simple." The bill was filed in the fall of 1857, and alleged the payment of one of the said bonds, and that the defendant, Butcher, had conveyed the land to the defendant, Holderfield, and that he, Holderfield, had covenanted to convey the same to the defendant, Pilson, both of whom had notice of the plaintiffs' equitable claim. The bill alleges that shortly before bringing the suit he tendered the purchase money agreed to be paid, with interest thereon, to the defendant, Holderfield, who was the attorney in fact of Butcher, but that he not only refused to accept the same, but hurried a messenger to the State of Missouri, where Butcher lived, and procured from him a deed for the premises to himself (Holderfield).

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The defendants, Holderfield and Pilson, answered, alleging that the plaintiff had only paid a part of the first bond, and had then left the State insolvent, and had abandoned all idea of insisting on his purchase, and that though he subsequently returned, he still had no idea of insisting on the fulfillment of this contract, until he was urged to do so by another person, who enabled him to raise the money which was tendered. The other material allegations of the bill are admitted by the answers. The bill was taken *pro confesso* as to Butcher.

There was replication and commissions and proofs were taken, and the cause being set down for hearing, was sent to this Court.

Barber and Mitchell, for the plaintiffs.

Boydén, for the defendants.

BATTLE, J. It is admitted by the counsel for the defendants that the plaintiff, Joseph White, had at one time the right to the specific (233) performance of the contract mentioned in the pleadings, but he contends that such right cannot now be enforced, for two reasons:

First. Because no action at law to recover damages would now lie upon it; and

Secondly. Because the right to enforce the contract in equity had been so acted upon by the plaintiff as to justify the defendants in treating it as abandoned.

1. The first ground of objection is clearly untenable. It is true there is a maxim that equity will not enforce the specific performance of an agreement, upon which an action will not lie at law for damages, and, anciently, it was the practice to send the party to law, there to establish the validity of the contract, before he was allowed to proceed in equity. That practice has fallen into disuse, and the maxim never meant more than that the contract must be such as the law would have recognized, if sued upon in proper time and under proper circumstances. If the rule were that equity would not entertain a suit for the specific performance of an agreement, except where, at the same instant, a suit might be sustained for a breach of it at law for damages, there would be no ground for the existence of another well-known maxim, that time is not of the essence of a contract in equity. Upon the efficacy of this maxim it often happens that a party, by a neglect of a strict compliance with his stipulations in a covenant or other contract; with regard to time, loses his right to sue at law, while he may yet have a remedy by a suit for a specific execution in equity. *Walker v. Allen*, 50 N. C., 58; *Falls v. Carpenter*, 21 N. C., 237. Time may, indeed, be made an essential part of a contract, even in the view of a Court of Equity, and in that case that court will require its observance as rigidly as a court of law.

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The counsel for the defendants contends that the present contract is one of that kind, and, in support of his position, he refers to the language of the bond for title: "Now, therefore, if the said Joseph White shall pay off the said bonds as they fall due, then, when the last of the said payments shall be made, the said W. S. Butcher shall personally, (234) or by agent or attorney, execute to the said Joseph White a good and sufficient title deed in fee simple." The purchase-money for the land was made payable in three installments, secured by three several bonds, and the counsel contends that the punctual payment of each, as it fell due, and, certainly, the payment of all, when last fell due, was intended as an essential requisite to his obligation to make title. We can not discover any such meaning in this any more than may be found in any other contract for the purchase of land, where the vendor stipulates to make title when the price shall have been paid. There is no clause that the contract shall be void if the purchase-money be not punctually paid, and if there were, it would have been waived by the conduct of the vendor in recognizing the existence of the contract, and offering to perform it after the last bond fell due.

2. The second ground of objection, that the contract of purchase was abandoned by the plaintiff, or that at least that his conduct in neglecting for so long a time to fulfill it, taken in connection with his leaving the State and his insolvency, justified the defendants in treating it as abandoned. It is manifest, from the testimony of Mr. Dobsop, that the plaintiff never intended to abandon the purchase, and although he acted in such a manner as would have justified the defendants in taking the proper steps to enforce either its prompt execution or its abandonment, yet no such steps were taken, and the plaintiff's claim to equitable relief still remains. The bonds which the plaintiff gave to secure the purchase-money were never surrendered nor offered to be surrendered to him, and the defendants had no right, while retaining them, to consider and treat the contract as being at an end. Their omission to adopt that course is fatal to their defense. See *Falls v. Carpenter*, *ubi supra*, and *Sugg v. Stowe*, 58 N. C., 126.

There must be a decree that the defendant, Holderfield, who obtained the title from the defendant, Butcher, after notice of the plaintiff's claim, must make title upon the payment of the purchase money, (235) with interest, after deducting the rents, as to which there must be an account if the parties desire it.

PER CURIAM.

Decree accordingly.

Cited: Boone v. Drake, 109 N. C., 82; *Hairston v. Bescherer*, 141 N. C., 209.

McWILLIAMS v. FALCON.

FREDERICK N. McWILLIAMS, Ex'r, against J. N. FALCON and others.

Where money is given by will, as a portion to a child, or to one to whom the testator stood *in loco parentis*, or for whose support it was intended to make a provision, or where the legacy is demonstrative, and the fund is productive, it was *Held*, that the legatee is entitled to interest from the death of the testator.

CAUSE removed from the Court of Equity of HALIFAX.

The bill in this case was filed by the executor to the will of Dudley Clanton, setting forth that the said testator bequeathed his real estate to be sold for the payment of his debts, and that if that were not sufficient for that purpose, his personal estate should be sold, and he directed that he should sell so much of his other personal estate as would, with the surplus remaining after the payment of his debts, be sufficient to raise in money \$5,000, to be held by the executor as a fund for the benefit of the defendant, Frances, the wife of J. N. Falcon, for her sole and separate use. He provided in the said will that the executor should pay the interest annually to the said Frances during her life, and if she should become discovert, and should need any portion of the principal for her comfort, then to pay to her so much thereof as might be requisite for that purpose; and after her death, to pay what might remain to certain legatees in said will named. The executor, in his bill, states that he had to sell all the land for the payment of the debts, and that he then sold a part of the slaves for the payment of the remainder of the debts, and for the purpose of raising the fund in question; that owing (236) to difficulties raised as to his right to the possession of the assets, and having to resort to the assertion of his right by suits in court, the settling of the estate was postponed for several years from the death of the testator, to wit, about seven years, and the only question presented by the pleadings is, whether Mrs. Falcon is entitled to have interest counted on her legacy, and paid to her for this space of time.

The bill calls on the persons next in interest to interplead, and to have the question settled by a decree of this court, so as to protect him.

Answers were filed by some of the defendants, and a demurrer filed as to Falcon and wife, and the cause removed to this court.

B. F. Moore for the plaintiff.

Davis and *Batchelor* for the defendants.

PEARSON, C. J. The general rule, according to the English authorities, is to allow a pecuniary legatee interest after the expiration of one year. There are, however, many exceptions. Among others, where the money is given as a portion to a child, or one to whom the testator stood

in loco parentis, or for whose support it was intended to make provision. In such cases interest is allowed from the death of the testator, because the object, *i. e.*, to furnish means for subsistence, does not admit of delay, and the legatee should not be left to starve. So, when the legacy is demonstrative, and the fund is productive, for instance, notes bearing interest or bank stock paying dividends, or negroes yielding hires; for the amount of the accumulated interest or dividends or hires certainly does not belong to the executor, nor has the legatee, to whom the *corpus* (that is, the notes, bank stock or negroes) is given, any right to it; nor should it go to increase the residuary fund, or be treated as undisposed of, and divided among the next of kin. Evidently there is no principle upon which either of these parties can claim a right to (237) be benefited by the delay in settling up the estate, and the rule is to consider the executor as having acted as a trustee, and to hold the accumulation for the use of the party to whose prejudice the delay operated, under the maxim, "Equity considers that done which ought to have been done," and will put the party in the same situation as if it had been done. *Beasley v. Knox*, 58 N. C., 1; *Turnage v. Turnage*, 42 N. C., 127. In such cases, as interest is allowed on the footing of an accumulation of the fund, and not on the ground that the executor is guilty of laches in withholding money that he ought to have paid, the calculation is made from the death of the testator and not from the qualification of the executor.

The case under consideration falls within the principle of both these exceptions; the interest is to be paid to the mother of the testator "*annually* for her sole and separate use"; so, it was manifestly the intention to provide her the means of subsistence. The legacy is demonstrative, and the fund out of which it was to be paid, to wit, the negroes, was productive, and yielded annual profits or hires, and there is no reason why the mother of the legatee should be subjected to loss because of the delay which has taken place in settling up the estate, or that any other person should be benefited by such delay.

The position taken in the answer that interest should not be allowed until the expiration of two years from the qualification of the executor, is untenable. It is supposed to be a corollary from the Act of 1789. That act was intended to remedy the evil of a delay on the part of executors and administrators in settling up estates, on the pretext of outstanding debts, and it requires them to settle up and pay over the assets to the legatees and distributees, at the expiration of two years from the time of their qualification, taking refunding bonds for the benefit of such creditors as may not have been paid; but it is by no means the policy of the law that they should not settle up sooner, if the condition of the estate will allow it, and no inference or deduction from the statute is

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admissible which would tend to defeat the object, in aid of which (238) that statute was passed, and to induce executors and administrators to delay making a settlement by exempting them from the payment of interest until after the expiration of two years. Most assuredly, this result cannot be allowed where the intention is to provide the means for the subsistence of the object of the testator's bounty, or the amount is charged on a productive fund.

PER CURIAM. There will be a decree declaring that the legatee is entitled to interest from the death of the testator.

Cited: Mordecai v. Boylan, post, 367; Hart v. Williams, 77 N. C., 428.

LARKIN LYNCH against JOSEPH A. BITTING.

Where it appeared that during a copartnership of eight years duration, there had been occasional calculations of interest and summing up of results and a division of profits, but no surrender of vouchers or cancellation of books, nor release, nor receipt in full, it was *Held*, that the transactions were not of such a conclusive nature as to bar an account.

CAUSE removed from the Court of Equity of YADKIN.

The plaintiff and defendant had been partners in the business of buying and selling slaves from the year 1847 to 1855, during which time large profits were realized from the business, amounting in the latter years of its continuance to as much as twelve thousand dollars. The plaintiff was the more active partner in buying and selling, and the defendant kept the books in which their dealings were entered. It appeared that the entries were mostly made at the dictation of the plaintiff and at stated periods, generally once a year, the plaintiff and defendant together made calculations of interest upon the entries and divided the profits according to the terms of their copartnership, that is, equally.

Sometimes errors in former computations were detected and corrected (239) in their subsequent ones. The defendant insists, by his answer, that a full, fair and conclusive settlement took place between the parties up to April, 1857, and that each party then received his share of the profits then on hand. Afterwards, in 1858, it appears that there had been collected some small debts due the concern, which were accounted for between the partners, and a loss of a debt, by the failure of an attorney in Georgia, also accounted for and divided between them. There was also, at this time, a rectification of the account and settlement of 1857. The answer sets forth the book containing their dealings, and insists that at each of these computations of interest and divisions of

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profits there was intended to be, and in fact was, a full and final settlement of all previous matters, and especially was the settlement of 1857 thus final and conclusive, and he relies upon the same as a bar to a further investigation of the dealings of the partnership.

There was some testimony taken, and the cause set down on the bill, answer, exhibits and proofs and sent to this Court by consent.

Clement, for the plaintiff.

Boyden and Mitchell, for the defendant.

MANLY, J. The parties to this suit were partners in buying and selling slaves from 1847 to 1855, and the bill is filed for an account and settlement of the partnership dealings. The objection brought forward in the answer to the account asked for is that there has already been an account stated between the parties, and a settlement in pursuance of it.

The Courts are averse to unravelling accounts that have once been settled between parties competent to deal with each other, and hence it is a fixed rule not to do so where the accounts have been complete—freely assented to and made the basis of a settlement (except in the case of bills surcharging and falsifying). As evidence of the required conclusiveness of a settlement to bar an account, it is usual in the plea to aver a surrender of vouchers. Between the parties before us there has been no change of the custody of papers, no cancellation of books, nor (240) release nor receipt in full, and, upon the whole, we are not satisfied, upon an examination of the testimony, that any account has ever been stated and conclusively agreed upon by the parties. There has been an occasional calculation of interest and summing up of results as they appeared upon the books of the partnership, and a division of profit balances; but inasmuch as there has been no *final* account at any time stated between them, our inference is that none of the transactions referred to were considered conclusive, even as to the matters embraced, but mere stages in their books to guide them in partial settlements. We find the parties rectifying the settlement of April, 1857 (the one insisted upon as conclusive), and we find them again accounting together in April, 1858, and dividing the balance. In the present state of the case, we do not enter into the matters of controversy between the parties: we hold simply that what appears to us in this case, that is, the striking of balances from time to time upon the partnership books, to aid in making a partial division of effects, is not such an accounting together as will bar a bill for a full account of partnership transactions.

PER CURIAM.

Decree for an account.

Cited: Rhyne v. Love, 98 N. C., 493.

ATTORNEY-GENERAL *v.* PIERCE.

ATTORNEY-GENERAL against WILLIAM H. PIERCE, Executor.

A legacy in remainder to collateral kindred, is liable to the tax imposed by the act of 1846, chapter 72, and the proper mode of suing for such tax is by a bill in equity, in the nature of an information, in the name of the Attorney-General.

CAUSE removed from the Court of Equity of CRAVEN.

This is a bill, in the nature of an information, alleging that Stephen Pierce died in the county of Craven in 1849, having bequeathed (241) considerable estate, consisting of lands, slaves, money and choses in action, to his brothers, subject to a life-interest therein to his mother; that the amount in value of said estate is \$20,000; that the defendant is nominated in the said will as executor, and as such, responsible for the tax imposed thereon by the revenue law of the State. The prayer is that the said executor be decreed to pay the said tax.

The answer of the defendant admits the material facts set out in the information, but contends that the legacies set out in the bill, being interests in remainder, are not liable to the tax imposed by the statute law of the State; but, at any rate, if so liable, the tax does not attach upon the said interests, until after they come to the legatees in possession. He also objects that by the Act of 1858 the bill should have been filed in the name of the State.

The cause was set for hearing on bill and answer, and transmitted.

Henry C. Jones, for the plaintiff.

Green, for the defendant.

BATTLE, J. This is an information, in the name of the Attorney-General, filed for the purpose of recovering from the defendant, as the executor of Stephen J. Pierce, the tax on legacies to collateral kindred, imposed by the Act of 1846, chapter 72. The defendant, in his answer, sets up two objections to the claim, one of which goes to its merits and the other only to the form of the remedy.

1st. The first objection is, that the tax specified in the act referred to, does not attach to the legacy in question; because it is the bequest of a remainder, after a life-estate given to the mother of the testator; or if it do attach to the legacy, it is not to be paid until the property comes into possession upon the death of the tenant for life. The objection, in either form of it, is untenable. The words of the act are sufficiently extensive to embrace such a legacy, and the manner in which the executor is directed to account for and pay over the tax by the fourth section, shows (242) that it is due immediately. The bequest of a remainder in slaves, or the specified articles, will, of course, be of less value than the

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whole interest in such slaves or other chattels, but it will have some immediate value, and that can be ascertained in the mode pointed out by the Act of 1848, ch. 81, for assessing the value of slaves and other specific personal estate given by will to collateral kindred.

The second objection is to the form of the suit, the defendant insisting that the bill ought to have been filed in the name of the State, as is expressly required by Laws 1858, Chap. 25, Sec. 80. The answer is, that the 114th section of the latter act excepts from its operation taxes due under the provisions of any former law, and *S. v. Brim*, 57 N. C., 300, shows that under such law, an information in the name of the Attorney-General is the most approved form of proceeding.

The plaintiff is entitled to a decree for an account, and to have the amount of taxes to which the State is entitled ascertained and paid in the manner prescribed by law.

PER CURIAM.

Decree accordingly.

Cited: S. v. Bridgers, 161 N. C., 258.

WHITMEL J. HILL, Adm'r, against JOSEPH J. WILLIAMS.

1. An answer, when directly responsive to the allegations of the bill, or to an interrogatory put in the bill, or on a special examination, is to be taken as true, unless it be proved not to be true by the oath of two witnesses, or of one witness with corroborating circumstances equal to the force of another witness, or by some other kind of evidence which is entitled to the weight of two witnesses on oath.
2. Where one, on the footing of a friend, neighbor and relative, undertook to manage the moneyed affairs of an old lady, without any stipulation as to compensation, and without intending to make any charge, it was *Held*, that he was not entitled, after her death, to claim a remuneration for his services, and that his being held to a strict account by her administrator, did not vary the case.
3. Where an agent withheld the notes of his principal from her administrator, which notes were of long standing, and large amounts of interest had accumulated, and being warned by the administrator that he would be held liable for interest on the accumulation unless he surrendered the notes, or had them renewed, it was *Held*, that he should be made liable so to account from the date of the filing of the bill.

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CAUSE removed from the Court of Equity of HALIFAX.

The bill was filed by the plaintiff as an administrator of Mrs. Temperance Dawson, asking for an account and settlement of defendant's agency in managing her plantation and pecuniary matters. It appeared from the pleadings and proofs that Mrs. Dawson had added to her estate a large property that had formerly belonged to her son, which she purchased at sale of property under a deed of trust; that the whole of her estate consisted of a large and valuable plantation and about sixty

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slaves; that her son, the former owner of a part of it, after the sale of it to his mother, remained with her, and controlled and managed the plantation business and money matters until his death in 1846, when the defendant, who was a neighbor and relation, on the footing of a friend, undertook the management of her affairs. It is alleged that the defendant, as the agent of Mrs. Dawson, from the time of the death of her son, up to the time of her own death in 1857, received the proceeds of the crops made on her farm; also the proceeds of the sale of several slaves, and other moneys, and invested the same, or a large part thereof, in the notes of divers persons to whom he loaned the money, and agreed, as to such part as was not invested that he would pay interest thereon, and this bill is filed for a discovery of these amounts, and for an account and settlement. The plaintiff alleges that just after the death of Mrs. Dawson there were in the defendant's hands notes of several years standing, on which interest had accumulated to a large amount, and that he called the attention of the defendant to the fact that this interest was an unproductive fund, and desired the defendant to hand over these notes (244) to him that he might administer them in the due course of law;

but that the defendant refused to do so, saying that he would have the notes renewed. He insists that the defendant shall pay interest on this fund from the date of such notification up to the time of the decree. The plaintiff also alleges that he demanded a full settlement of the agency, which was refused by the defendant, unless the plaintiff would agree to go into such settlement without time to examine his counter-claims, and on other terms which were unreasonable and inadmissible.

The answer of the defendant sets forth that on 21 October, 1847, he had a settlement with Mrs. Dawson of all the charges which she had against him, and on that occasion she fell in his debt in the sum of \$40.32, for which she gave her note, and he proffers to exhibit the said note. The defendant denies that he agreed to take any part of Mrs. Dawson's money and pay interest, but says he always made known to her he would not hold, keep or use her funds on these terms, but would loan out the same whenever he had a safe opportunity of so doing. The defendant, further answering, says that he furnished the said Temperance, at different times, a list of her notes in his possession, in order to enable her to give in the amount of interest for which she was taxable under the revenue laws of the State, one of which, he says, was furnished shortly before her death; that these papers had come to the possession of the plaintiff, and he prays that he may be compelled to produce the same. The defendant states the balance in his hands, and proposes to pay over the same to the plaintiff. He says he has been at great trouble and expense in the management of the business undertaken by him, and he thinks he is entitled to compensation.

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There was replication to the answer, and, by consent of parties, it was referred to Messrs. R. H. Smith and W. R. Smith, as commissioners, to state the account between the parties, and it was ordered that each party have leave to examine the other on oath on written interrogatories, and that the defendant file in the office of the Clerk and Master all papers in his possession relating to the business affairs of T. W. Dawson. The commissioners reported a balance against the defendant of (245) \$3,200.22. The commissioners set out with a charge against the defendant founded on a paper which is referred to as (1), which is as follows:

PAPER (1).

"Mrs. T. W. Dawson has deposited in my hands, for safe keeping, the proceeds of her crops for several years, with directions not to loan it out, but I have concluded it would be best to violate her orders, and within the last fourteen months I have loaned out four thousand, four hundred and fifty-eight dollars, which I suppose she should give in as a part of her taxable property.

"July 18, 1853.

JOS J. WILLIAMS."

This is the basis of the first item in the account stated, which is "1853, July 18. Dr. the defendant to \$4,458." The second item is interest on the same to 16 April, 1860, \$1,811.43. The next item is dated 15 June, 1854, and is for \$1,000, with interest on the same to 16 April, 1860, and is based upon the following:

PAPER MARKED (2).

"Add one thousand dollars to your list of money given in last year loaned out. June, 1854.

"JOS. WILLIAMS."

The defendant excepts to these items, and says that the account ought not to begin in 1853, but in July, 1854, and that the third item ought not to bear date of June, 1854, but of June, 1855; and he produces the following papers, marked (3) and (4), to substantiate that exception:

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PAPER (3).

"I hold in my care, for Mrs. T. W. Dawson, the following notes of hand:

"One note drawn on K. Taylor for \$200, with interest from 8

October, 1851 \$ 200.00

"Do. S. Ward, Bryant Bennett, B. Williams, for \$1,412.25. 1,412.25

Int. from 12 June, 1852.

"Do. Bryant Bennett, for \$759.09; int. from 10 September, 1853 250.09

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"Do. Jordan & Howell, note, \$281.41; int. from 14 October, 1853	\$281.41
"Miles Davis and J. Upton note, \$1,000; int. from 20 October, 1853	1,000.00
"A. & H. Harris, Norfolk, \$515.11; int. from 2 July, 1853.....	515.11
"\$4,458.77	\$4,458.77
6	
\$267.52.62.	JOS. J. WILLIAMS."

PAPER (4).

"State of North Carolina, Halifax County.

"I, Joseph H. Whitaker, Clerk of the Court of Pleas and Quarter Sessions for said county, do hereby certify that on examining the records in my office, I find that Mrs. Temperance W. Dawson listed in the year 1854, two hundred and sixty-eight (\$268) dollars in annual interest, and in 1855 she listed three hundred and twenty (\$320) dollars, and in 1856 she listed four hundred and fifty-eight (\$458) dollars. Given under my hand this 11 April, 1860." (Signed by the Clerk.)

The defendant also files letters from A. & H. Harris, dated in September, 1854, acknowledging a balance of upwards of \$500. From all which he insists that the error complained of is apparent.

The only other exception raising a question was one by the plaintiff, objecting to the allowance of commissions to the defendant, and refusing to charge interest upon the interest accumulated in his hands, and which defendant was warned would be insisted on unless the notes were handed over to the administrator, or by himself renewed.

These exceptions were set down for argument, and heard at this term.

B. F. Moore for the plaintiff.

Badger, Barnes and Conigland for the defendant.

(247) PEARSON, C. J. The first exception of the defendant is allowed.

The commissioners did not duly appreciate the *technical force* which is given to an answer when directly responsive to the allegations of the bill, or to an interrogatory put in the bill, or on special examination. Such answer is to be taken as true, unless it be proven not to be true by the oaths of two witnesses, or of one witness with corroborating circumstances amounting to the force of another witness; or by some other kind of evidence which is entitled to the weight of two witnesses on oath.

In this case there was no witness, and the plaintiff, to disprove the answer, relied on the evidence furnished by papers marked (1) and (2).

As an explanation of this seeming contradiction, the defendant makes the allegation of a mistake in both of these papers in respect to the dates, and avers that the proper date of the paper marked (1) should be "1854," instead of 1853, and that of the paper marked (2), "1855," instead of 1854, and to show this mistake, he produces papers marked (3) and (4). By an inspection of the papers marked (1) and (3), it is manifest that the one was made from or with a direct reference to the other, and taking into consideration the fact that papers (1) and (2) do not purport to have been made for the purpose of being *the basis of a charge* as between Mrs. Dawson and her agent, the defendant, but simply for the purpose of furnishing her the amount to be listed by her as taxable interest, in which view it was not necessary for the paper to have a date (as it was to be acted on at the time), and, of consequence, but little attention would be given to the accuracy of the date, we accept this explanation as entirely satisfactory, and reject the conclusion of the commissioners, because it involves the inference not only that Mrs. Dawson willfully neglected to list her taxable interest at the proper time, but that in 1854, having the papers (1) and (2) before her, she knowingly took a false oath in listing the amount called for by paper (1), and omitted the additional amount called for by paper (2), and the further inference that the defendant has sworn falsely in his answer, and also has been guilty of manufacturing evidence, (248) to wit, the paper marked (3), under circumstances equivalent to perjury. We will here remark that the recital in paper (1) that Mrs. Dawson had directed the defendant *not to loan out her money*, is made obviously for the purpose of furnishing her with an excuse for not having listed any taxable interest in the year 1853, and when we find her in 1854 listing her taxable interest on the basis of that paper, the fact that it was made out in 1854 is manifest without calling in aid the weight to which the answer is entitled.

The paper marked (3) is the proper basis of charge in stating the account, and that furnishes the respective dates from which interest should be calculated, and disposes of the sixth exception on the part of the plaintiff.

The second exception of the defendant is overruled, and the first exception of the plaintiff is allowed. The defendant having undertaken to transact the money matters of Mrs. Dawson on the footing of being a neighbor and a relation, and without making any stipulation or intention of making a charge for it, has no right, after her death, to claim remuneration. It may be, if he had apprised her of his intention to charge for his services, she would not have employed him; but it is sufficient to say, as he undertook to do it gratuitously, there is no principle upon which a promise by her to pay for his services can be implied.

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It may be that he expected she would make a will and give him a legacy. If so, his disappointment is no more than what all persons having expectations of the kind are liable to. Nor can we yield our assent to the position that although he did not intend to make a charge, still, as her administrator requires him to give an account of his agency, he, on that footing, becomes entitled to compensation. We do not see how this follows. It is to be presumed that he was, at all times while she lived, ready and willing, if called on by her, to come to a settlement and make out a statement showing how matters stood between them, and he was under a similar obligation to do so when called upon by her personal representatives, upon whom the law imposed the duty of requiring a settlement. This case is distinguishable from that supposed by the defendant's counsel on the argument; a guardian strikes a rough balance without charging commissions, and proposes to close the matter on that footing; if it is declined and he is required to go into a settlement, produce regular vouchers, and acquit himself of any neglect in failing to collect debts and matters of that kind, whereby he is chargeable, although he has made no gain, he may well, then, insist upon an allowance of commissions; because he is by law expressly entitled to charge commissions; but there is no statute by which the defendant is entitled to commissions, and in the absence of a contract to that effect, he was not so entitled, and, therefore, could not, like the guardian, propose to waive his right to commissions, provided he was not held to a strict accountability.

The second exception of the plaintiff is withdrawn.

The third exception is allowed. As there was a large amount of unproductive interest due upon the notes he held, belonging to the plaintiff's intestate, it was his duty, upon being warned to pay over the notes, or have them renewed, to have done so, and the loss of interest upon this interest, incident to his neglect and refusal, should fall on him by striking the balance at the time the bill was filed.

The fourth exception is overruled, and also the fifth, for the same reason: The answer being responsive, is evidence for the defendant, and supports the claims covered by these exceptions.

There will be a reference to have the account stated according to this opinion.

PER CURIAM.

Decree for an account.

Cited: McNair v. Pope, 100 N. C., 408.

AUGUST TERM, 1861.

(AT MORGANTON.)

(250)

TATHAM against WILSON.

Where a husband and wife brought suit in a court of equity for the distribution of a fund limited to them and others by deed, as joint owners, and after an interlocutory decree for an account, but before the account was taken, the husband died, it was *Held*, that the wife, surviving, was entitled to the fund.

THIS cause was removed from Court of Equity of MACON.

After the hearing of the cause at a former term of the Court, and a decree for an account against the defendants, who had the fund in their possession, it was referred to Mr. Dodge, the Clerk of this Court, to report the names of the children of Rachel Wilson, and the amount of the several shares to which each was entitled.

The Clerk reported at large, and there was no exception taken to his report, except one, filed by W. L. Love, the administrator of William Tatham. In the report, the Clerk states that William (251) Tatham intermarried with Isabella, one of the children of Rachel Wilson, and joined with his wife and others in bringing the suit for the proceeds of the property, limited to them after the death of Rachel Wilson, and that a decree was passed declaring the plaintiffs entitled to an account of the fund, and that afterwards the said William Tatham died, and Mr. Love administered and became a party to the suit, and the question was made before the commissioner whether the share of said fund belonging originally to Isabella, the wife of said William, enured to his representative, or whether she is entitled to the same.

The commissioner reported that Isabella Tatham, the wife, was entitled to the share aforesaid, and on this ground the administrator excepts.

The cause being set down for argument, it was argued at this term by

Henry and Shipp, for Love, the administrator, and
Gaither and N. W. Woodfin, for Mrs. Tatham.

PEARSON, C. J. The exception is overruled. It is clearly settled that where a husband dies after an interlocutory decree for an account, the wife surviving, becomes entitled to the amount that may be recovered by the final decree; indeed, the wife, surviving, is entitled, although the husband should not die until after final decree; for he does not actually

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reduce the chose into possession by a judgment or final decree; that can only be done by execution or payment to the husband, and the legal effect given to a judgment or decree is to give the husband the benefit of taking, by survivorship, in case of the wife's death; *Nanny v. Martin*, 1 Eq. Ca. Ab., 68; *McCauley v. Phillips*, 4 Ves. Jun'r, 15.

PER CURIAM.

Decree according to report.

JUNE TERM, 1862.

(AT RALEIGH.)

(253)

BRYAN W. GREEN and others against CARTER B. HARRISON and others.

A clerk and master in equity is no such party to a suit pending in his court as to entitle him, under the fourth chapter, twenty-third section, of the Revised Code, to appeal from an interlocutory order appointing another than himself a commissioner to sell real estate.

MOTION on previous notice for a *certiorari* to the Court of Equity of WAKE, to bring up to this Court the proceedings of this case. The whole matter sufficiently appears from the opinion of this Court.

Winston, Sr., for the applicant.

B. F. Moore and Miller, for the opposers.

BATTLE, J. This is an application to this Court for a writ of (254) *certiorari*, founded upon the following statements of facts: The widow and children of Bryan Green, deceased, filed their petition in the Court of Equity for the county of Wake, in which they set forth that the said Bryan Green had died intestate, leaving a large real and personal estate, and that Carter B. Harrison had been duly appointed his administrator; that the estate was very much indebted, so much so that it would require not only all the perishable estate, but a considerable number of slaves, to pay the debts, and that it would be very much to the interest of the petitioners, who were the widow and next of kin of the deceased, to have a part of the real estate sold and substituted in the place of slaves in the payment of debts. Some of the petitioners were of full age and others minors, who sued by their guardian, and a decree was prayed to carry into effect the object of the petition. Carter B. Harrison, the administrator, was made defendant, and filed an answer, in which the facts stated in the petition were admitted, and he expressed the opinion that the best interests of the petitioners would be promoted by the course proposed. And an order of reference having been made to the Clerk and Master, he reported that it would be to the advantage of the petitioners to have the object of the petitioners carried out. A decree was thereupon made ordering a sale of certain portions of the real estate, and appointing the administrator a commissioner to make the sale, etc. Robert G. Lewis, the Clerk and Master of the Court, opposed so much of the decree as related to the appointment of the com-

missioner to make the sale, insisting upon his right to be appointed, and upon his opposition being overruled, prayed an appeal to the Supreme Court, which was refused.

The only question now presented to us, and upon which it is proper for us to express an opinion, is whether the applicant for a writ of *certiorari* had a right to appeal from the order made in the Court of Equity for Wake County. The order, notwithstanding the form of it, was an interlocutory one, made in the progress of a suit of equity.

(255) If the applicant had a right to appeal from that order, he must derive it from the provisions of the Revised Code, ch. 4, sec. 23, which are as follows: "The Superior Court may, whenever it shall be deemed proper, allow an appeal to the Supreme Court from any interlocutory judgment, sentence or decree, at law or in equity, at the instance of the party dissatisfied therewith, upon such terms as shall appear to the Court just and equitable," etc. The right of appeal, then, is given to a party to the suit. Who is a *party* to an action at law or a suit in equity? We understand that by such a *party* is meant one who is directly interested in the subject matter—who has a right to make defence—control the proceedings—adduce testimony—cross-examine the witnesses introduced on the other side, and to appeal from the judgment or decree; see 1 Green. on Ev., secs. 523 and 535; 20 How. St. Tri., 538-n; 2 Bouvier's Law Dic., 284. All other persons are regarded as strangers to the action or suit. Tested by this definition, can the Clerk and Master, claiming a right to be appointed a commissioner to sell lands in the progress of a suit in equity, be deemed a party to the suit? Is he directly interested in the subject matter of the suit? Or has he a right to make defence, control proceedings, adduce testimony and cross-examine the witnesses of the opposite side? Certainly not. He can not then, in any proper sense, be deemed a party, and not being such, the statute does not give him any right of appeal.

Under the first section of the fourth chapter of the Revised Statutes of 1836, a right of appeal from the county to the Superior Court of Law was given to either the plaintiff or defendant, or to any person "who shall be interested." Under the latter clause of this section we held in *Murphrey v. Wood*, 47 N. C., 63, that a purchaser of land under an execution issued on a dormant judgment, had such an interest in the subject as entitled him to intervene and appeal from an order of the County Court setting such execution aside. And again, in *Watkins v. Pemberton*, 47 N. C., 174, we decided that the next of kin of an intestate was interested in an order of the County Court, obtained by an administrator to sell the slaves belonging to the estate for distribution, (256) instead of having them divided specifically, and that they might appeal from it. The clause under which these decisions were

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made, has been omitted in the Revised Code; see chapter 4, section 1; and we presume such appeals could not now be allowed. No such provision was ever made in the grant of the right of appeal from the Superior Court of Law or Court of Equity to the Supreme Court. (See 1 Rev. Stat., ch. 4, secs. 22 and 23; Rev. Code, ch. 4, secs. 22 and 23), and it follows that no person but a party can appeal from the sentence, judgment or decree of the former court to the latter. As the present applicant was not a person who could appeal from the interlocutory order made in the Court of Equity for Wake County, he can not be allowed the writ of *certiorari* to bring up the record of the suit, or any part of it, to this Court.

We abstain from expressing any opinion in relation to the decree made in the Court below, except merely to say that the present applicant can not bring it before us for review, either by appeal or by writ of *certiorari*. The applicant must pay the cost of his motion.

PER CURIAM.

Decree accordingly.

DILLIN & CHERRY against JOHN W. SESSOMS.

A motion to dissolve an injunction may be continued for any cause the court may deem sufficient, even without a written affidavit.

APPEAL from the Court of Equity of WASHINGTON, Fall Term, 1861.

The bill in this case was filed for an injunction to restrain, in part, the collection of a judgment at law, alleging a failure of consideration and other matters; an answer was filed by the defendant, but the merits of neither the bill nor answer are material to the questions considered by this Court. These arise altogether upon the following (257) transcript from the Court below:

“Cherry and Dillin against John W. Sessoms.

“Injunction.

“The cause being called, the complainant moved for a continuance, for cause shown; pending which, the defendant moved to dissolve the injunction. Ordered by the Court, that the cause be continued to the next term. Appeal by the defendant.”

No counsel appeared for the plaintiff in this Court.

Winston, Jr., for the defendant.

MANLY, J. The record does not state with distinctness the ground of appeal in this case, and we are not quite sure that it is properly appre-

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hended. It is set forth that, on the calling of the case, the complainant moved a continuance for cause shown, and, pending this motion, the defendant moved to dissolve the injunction. The Court continued the cause, and the defendant appealed.

If the matter of complaint be that a motion to dissolve an injunction must be heard at the first term when it is made, we do not think it is sustained by any rule of law or of practice. Such questions, like all others, arising either upon the final hearing, or in earlier stages of cases, are subject to be continued by the Judge for any cause which he may consider, in the exercise of a sound legal discretion, to be sufficient.

If the complaint be that there should have been an affidavit filed, setting forth the cause for continuance, we think it equally untenable. The Rev. Code, ch. 31, sec. 57, pl. 13, applies exclusively to actions at law, as is manifest from the language of the clause and from the subject matter of the whole chapter. We are not, indeed, aware of any restriction upon the power of a Judge, sitting as a court of equity, to continue a cause before him in any stage, or pending any motion in it, (258) when he may deem it expedient for the purposes of justice. It is a power subject only to his sound discretion.

We have not called to our aid the statute of 1861, second extra session, chapter 10, section 4, for the reason that it is not necessary to derive the power exercised in this case from any other source than the general discretionary powers of a court of equity; and for the additional reason that it seems to be uncertain whether the law of 1861 was in force at the time of the making of the order of continuance in question.

The appeal should be dismissed, with costs against the appellant, and the same certified to the Court of Equity for Washington County, to the end that the said Court may proceed in the cause.

PER CURIAM.

Appeal dismissed.

ARCHIBALD MCKAY and others against DANIEL MCNEILL and others.

1. Where it appeared that the title to land, sought to be sold for partition, was subject to be divested out of the petitioners, by the terms of an executory devise, which extended to it, it was *Heid*, that the court could not order a sale of the premises.
2. Where a bill is filed to have land sold for partition, but no actual partition is asked in the alternative, and no general relief prayed for, the court will not order such actual partition, though the parties might seem to be entitled to it, if the bill had been framed otherwise.

APPEAL from the Court of Equity of ROBESON.

The bill was filed by the plaintiffs as the heirs at law of Neill McNeill, deceased, for the sale of a certain tract of land, which came to them, as

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they allege, after the failure of certain limitations in the will of said Neill McNeill. They set forth in the bill that as to the land in question, it was devised in said will as follows: "My plantation, my woman Bet, stock of all kinds, farming utensils, household and kitchen (259) furniture, books, cart, chair, and whatever I may possess, not otherwise disposed of, to be my son David's, his natural lifetime, and my single daughters, remaining on the plantation, should they live longer, to be his heirs and the heirs of each other in the plantation, whilst single, and should my son Daniel have a male heir, he shall be heir to my plantation after the death of my single daughters." The plaintiffs allege that David is now dead, and that the three daughters, Catharine, Jane and Elizabeth, were single at the time of the death of the testator, and resided on the plantation in question with their brother David, but that they all three married and removed from the plantation; and these, with their husbands, are made defendants to this bill. The plaintiffs allege that Daniel is still alive, and is married, and has been so for several years, but that no child, either male or female, has been born to him.

Daniel McNeill answered and opposed the sale of the land, on the ground that during his life no sale of the premises could take place, as no absolute title accrues to the children of Neill McNeill until the removal of the contingency of his having a male child born to him. Elizabeth and Catharine, two of the daughters mentioned in the will of the testator as being single and resident on the land, but who are now married, with their husbands, demurred to the bill.

The cause was set for argument on the bill and demurrer, and the Court ordered the demurrer to be overruled, from which the defendants appealed to this Court.

Leitch, for the plaintiffs.

Shepherd and *W. McL. McKay*, for the defendants.

BATTLE, J. The will, which we are called upon to construe, is certainly inartificially drawn, and some of its terms are somewhat obscure, but we think enough appears to show that the construction contended for by the plaintiffs is correct. The land in controversy was given to the testator's son David, for life, and the daughters, who were living on the premises at the testator's death, were to have it for (260) life also, provided they remained single and survived David. But they married and left the premises; so this life estate was defeated by the condition annexed. The only other devise of the land is to the male heirs of the testator's son Daniel, which, as Daniel has yet no son, remains an executory one. The consequence is, that as the life estates

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given have terminated by the death of David and the marriage of the daughters, the land belongs to the heirs at law of the testator, subject to the executory devise in favor of the heirs at law of Daniel McNeill. Such being the case, the Court can not order a sale, because it can not defeat the executory devise and convey a good title in fee simple to the purchaser. *Watson v. Watson*, 56 N. C., 400.

That, however, does not deprive the plaintiffs of the right to have a partition of the land, and if the bill contained either a specific prayer in the alternative for that purpose, or even a prayer for relief generally, we should not hesitate to order a partition among the parties specifically, but in the absence of any such prayer, we would not be justified in ordering what the parties have not asked, and what, so far as we know, they do not want.

We must, therefore, sustain the demurrer and dismiss the bill, but it is without prejudice to the right of the plaintiffs to file a bill for a partition of the land according to their interest in the same.

PER CURIAM.

Bill dismissed.

Cited: Marsh v. Dellinger, 127 N. C., 362.

(261)

MARY EASON, Adm'x, against JOSEPH B. CHERRY and others.

Where one of a copartnership, by any means, gets a fund belonging to the firm, he is not at liberty to appropriate it to his own exclusive benefit but must share it with his copartners.

CAUSE removed from the Court of Equity of BERTIE.

Joseph B. Cherry, William H. Tayloe and Alfred Eason, entered into a copartnership for the purchase of a large quantity of cypress timber (standing), with the purpose of jointly working it into shingles, and of shipping and selling the same, for which they gave their joint notes to the proprietor, one Roscoe, for the sum of \$5,000. Afterwards, instead of working the timber, they sold it for an advance of \$800, for which the partner Cherry received the money. In the purchase and use of said timber, each of the said partners was to pay one-third of the expenses, and receive one-third of the profits. Cherry agreed, on receiving the money, on the resale of the timber, to pay Roscoe the original purchase money, but he has failed to do so, and is now insolvent. After receiving the money on the resale, he advanced of it to Eason the sum of \$2,601 for which he took his notes, payable to himself (Cherry), and on which suit has been brought and judgment taken, and it is to enjoin the collection of this judgment that this bill was filed by Eason's

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administratrix, he being now dead. The ground of this application is, that the original debt is still due Roscoe, and suit has been brought thereon, and judgment and execution will be obtained against the three, Cherry, Tayloe and Eason's estate; that Cherry is insolvent, and judgment and execution will be taken against him for more than the amount of his share of the property; that Eason's estate (he being now dead) is good for his part of the debt to Roscoe, and Tayloe is good for his half of it, but if Cherry is permitted to enforce the judgment he has obtained on account of the advancements to him, he will lose the benefits of these advancements, on account of the insolvency of Cherry. The prayer is, therefore, to restrain Cherry from pressing an execution at law on this judgment against Eason's estate.

There is no controversy as to Cherry, but Tayloe answers and insists that inasmuch as Eason has received so much of the joint (262) copartnership funds, and he (Tayloe) has received nothing, and, inasmuch as he is able, and will have to pay half of the original purchase money to Roscoe, he is entitled to share in one-half of the advancements made by Cherry to Eason, and that as to that much of Cherry's judgment against Eason's administratrix, she should be decreed to pay it to Tayloe.

The cause was set for hearing on bill and answers, and upon a motion to dissolve the injunction, was sent to this Court by consent.

Garrett and Barnes, for the plaintiff.

Winston, Jr., for the defendant.

BATTLE, J. There can be no doubt that the plaintiff is entitled to relief against the defendant Cherry; but we think it is equally clear that the defendant Tayloe is entitled to share in the relief. The plaintiff's intestate and the defendants being partners in the purchase and sale of a lot of timber, mentioned in the pleadings, whatever part of the partnership funds came to the hands of either of the members, before a final settlement of the concern, belonged equally to all. This is so obvious a principle of the law of partnership that it scarcely needs the aid of an adjudicated case for its recognition, but if it did, that of *Allison v. Davidson*, 17 N. C., 79, is one directly in point. It was there held, among other things, that where of four partners, one died insolvent, largely indebted to the partnership, and two others, without the consent of the fourth, received their shares from the executor of the deceased, the sums so received remained, as between the survivors, joint stock. So, in the present case, Cherry being insolvent, largely indebted to the partnership, the sum received from him by the plaintiff's intestate is, as between her and the defendant Tayloe, joint stock, to which they are

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equally entitled. An analogous principle prevails among co-sure-
(263) ties, so that when one of them, by any means, gets a fund belonging to the principal, he is not at liberty to appropriate it to his own exclusive benefit, but must share it with his co-surety. This has been decided in many cases, among which are *Barnes v. Pearson*, 41 N. C., 482, and *Leary v. Cheshire*, 56 N. C., 170.

PER CURIAM. A decree may be drawn in accordance with this opinion.

JANE BENNETT against JACOB MERRITT and others.

1. Where the agent of a trustee received money, arising from the sale of trust property, made by collusion with him, it was *Held*, not to be a defense to a bill against such agent to follow the funds in his hands, that he had paid the money over on liabilities which he had incurred for the trustee.
2. Where trust property is wrongfully sold by a trustee, by collusion with another, who did not, however, receive any part of the price for which the property sold, it was *Held*, that the principle of following the trust fund, in its converted state, does not apply to such other person.

CAUSE removed from the Court of Equity of WAYNE.

Thomas Bennett, of the county of Sampson, died about 1857, leaving a widow, the present plaintiff, Jane, and one daughter, Virginia, his distributees, and the defendant James R. Parker administered on his estate. Afterwards, in August, 1857, Virginia, the daughter, died, leaving her mother, the said Jane, her sole distributee. J. R. Parker also administered on her estate. The said Parker took possession of the personal estate of both, consisting of slaves, household furniture, stock of horses, etc., carriage, growing crop, provisions on hand, notes, etc., on several individuals. In March, 1858, the defendant Jacob Merritt insinuated himself into the confidence of the plaintiff and married her, she having first made a deed of marriage settlement,
(264) securing all her property to her sole and separate use, and constituting himself (the said Merritt) her trustee. It turned out that Merritt, at the time of this marriage, was a married man, and had a wife then living in the State of Alabama, and was otherwise a very faithless and unworthy man. Shortly after the marriage with Mrs. Bennett, he set himself to work, by harshness and intimidation, to get her property in his hands, and to sell all of it he could get. Parker, the administrator, who seems to have understood the character of Merritt, thwarted him as much as he could in his designs of despoiling Mrs. Bennett of her property, and kept much of it in his hands, while it

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appears that the defendant Monk, an uncle of Merritt, aided and abetted him in his designs. It appeared that Mrs. Bennett was induced, after the marriage, to remove from her homestead in Sampson to a place called Magnolia, in Duplin County, belonging to Monk, and he admits that he advised their removal to this place, but says it was from kind and benevolent motives.

It is alleged in the bill, and admitted, that Merritt made a conveyance of all his interest in the slave property, which had belonged to Mrs. Bennett, to the defendant Monk, but he says that this conveyance was by no means made in fraud of the *cestui qui trust*, but for a valuable consideration, to wit, the indemnity of him (Monk) for debts paid and liabilities incurred by him for the said Jacob. It appeared that Merritt succeeded in getting two of the slaves, Hillory and Ellender, which he sold for \$., and delivered \$900 of the money to Monk, who, in his answer, says he paid it out on liabilities which he had incurred for Merritt, and he goes into a list and minute account of such payments. Monk answers that he had no knowledge how the money arose, but the proofs on this subject, in the opinion of the Court, are sufficient to fix the knowledge upon him.

Merritt got possession of another slave belonging to Mrs. Bennett, by the name of Dilsey, and in company with Monk was proceeding to carry her out of the State to sell her. On arriving at Goldsboro, they consulted an attorney, who told them they could not sell the (265) slave unless they got the authority of Parker, the administrator. They then went back to Parker, who executed a bill of sale to Monk for Dilsey, and he conveyed her, in like manner, to Merritt, who took her to Richmond and sold her and received the money for her. Monk, in his answer to this allegation, says that Dilsey was an unmanageable slave, and had lately run away, and that her mistress was displeased with her, and wished her sold. He denies receiving any part of the purchase money.

The prayer of the bill is for a decree of nullity of the marriage, and that Monk deliver up, for cancellation, the conveyance of the property to him by Merritt, and that he account for the value of all the property belonging to Mrs. Bennett which was sold by Merritt, and for the \$900 received by him, as being the proceeds of her property, also for a decree against him for the price of Dilsey, and also a decree against Merritt for an account of all the property which came into his hands.

The cause was set for hearing on the bill, answer, exhibit and proofs, and sent to this Court by consent.

B. F. Moore, for the plaintiff.

McRae, for the defendants.

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PEARSON, C. J. The allegation that at the time of the marriage the defendant had a wife who was then living, is clearly proved; of course his marriage with the plaintiff was void, and she is entitled to a decree of "nullity of marriage" so far as she is concerned. She is also entitled to a decree making void the deed by which, in contemplation of marriage, she conveyed her estate to Merritt, in trust, for her sole and separate use. She is also entitled to a decree that the conveyance of the slaves, made by Merritt to Monk, shall be surrendered and cancelled, so as to remove the cloud from her title.

We are also satisfied by the evidence that the \$900 which Merritt handed over to the defendant Monk, to secure him against the (266) liabilities which he had entered into for Merritt, was money received by Merritt for the two negroes, Hillory and Ellender, and, on the ground of following the trust fund, the plaintiff is entitled to a decree against Monk for that amount. He faintly denies notice, but that is clearly fixed on him, and the ground on which he puts himself in respect to this money, to wit, that he had paid it to the creditors of Merritt, to whom he had become liable as surety for Merritt, will not avail him. That money, in his hands, was a part of the trust fund, and he knew it; consequently, Merritt, as a trustee, had no right to apply it to the discharge of his debts, and the defendant Monk had no right to do so for him.

In respect to the woman Dilsey, we have had more difficulty in coming to a conclusion. She was conveyed by Parker to Monk, and he made a bill of sale to Merritt, for the purpose of enabling Merritt to sell her. Merritt did accordingly sell her, but it does not appear, according to proofs, that Monk received any part of the purchase money; on the contrary, we are satisfied that Merritt used the money received by him as her price himself; so the principle of following the trust fund, in its converted states, does not apply, and putting out of view the averment that the woman Dilsey was thus sold by the consent of the plaintiff because of the slave's insubordination, and also the averment that it was done under the advice of respectable counsel, we can see no ground on which the defendant Monk can be made liable in respect of this slave, even if we suppose he acted collusively, and became an actor in the transaction with an intent to aid Merritt, the trustee, to get into his hands this negro and sell her, and appropriate the purchase money to his own use; for when Monk takes the ground that no part of the money can be traced to his hands, he can not be reached on the principle of following the fund, and there is no other principle by which, in equity, he can be made liable.

The defendant Merritt is chargeable with all the funds which came to his hands, by reason of the sales made by him or otherwise.

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As to the other property, the deed executed by Merritt to Monk does not include it, and there is no proof of his having taken it (267) into his possession, so there can be no decree in respect to it. So the plaintiff must be left to her own vigilance in gathering it up. There will be a decree against Parker for an account.

PER CURIAM.

Decree accordingly.

KENNETH GILLIS and wife against WILLIAM HARRIS and ROBERT HARRIS, Executors.

However deeply impressed the court may be as to a testator's particular intention, if he has been grossly negligent in setting forth his purpose, and to declare such to be his intention, would require the court to ignore the principles which have been adopted to give effect to the intentions of testators, such declaration will not be made.

CAUSE removed from the Court of Equity of GRANVILLE.

The suit is brought against the defendants, as executors, to recover a legacy of "three small negroes," given to the plaintiff Mrs. Sarah Gillis in the will of her father, Robert Harris, who died in the county of Person on the....day of....., 1847. The will is dated 1 June, 1842, and probably was written about that time, but the proofs go to fix its actual execution on the....day of....., 1847, when it was materially altered by interlineations and additions. As there were many facts brought into the argument arising from the face of the will, it is deemed advisable to set it out in full:

"Item 1. I give to my son, William Harris, one horse, bridle and saddle, one cow and calf, one bed and furniture, 273½ acres of land, whereon he now lives, six negroes, by name, Linda, etc., and unto him and his heirs forever, which he has already received.

"Item 2. I give and bequeath to my son Lawson Harris, one horse, bridle and saddle, one cow and calf, one bed and furniture, (268) three hundred acres of land, adjoining, etc., which he has already received and expended the value to his own use.

"Item 3. I give and bequeath unto my daughter, Sarah Gillis, one feather bed and furniture, one mare, bridle and saddle, four negroes, by name, Dice, Jenny, Peggy, Jacob; to her and her heirs forever, which she has already received.

"Item 4. I give and bequeath to my son Robert Harris, one horse, bridle and saddle, one bed and furniture, seven negroes (naming them), to him and his heirs forever, which he has already received.

"Item 5. I leave to my beloved wife, Sarah Harris, the tract of land whereon I now live, during her life, or my widow; also, as many of my

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negro men and women as she chooses out of the number I leave; two choice horses; four cows and calves; all my stock of hogs, 15 choice sheep (several small articles), the rest of my black people to be divided after William Harris receives one, the value of Tine, which my son Robert Harris has, over the number of his brother William. Also, it is my desire that my son William to have fifty-three dollars, to make his tract of land equal value with the tract I gave my son Lawson; also, it is my desire that my daughter, Sarah Gillis, to have three small negroes more, which will make her number seven, equal to her brother's number.

"I give and bequeath unto the heirs of my son Lawson Harris, deceased, two negroes, Milly and Jeff, to them and their heirs forever.

"Item. I give and bequeath unto my son Robert Harris, the tract of land whereon I now live, containing 600 acres, after the death or marriage of my wife, to him and his heirs forever; also, the negroes which I leave her, to return to my estate at her death or marriage.

"I give and bequeath unto my daughter, Sarah Gillis, the tract of land whereon my brother, Overton Harris, lived, containing 150 (269) acres, to her and her heirs forever. My other two tracts of land, not mentioned, including the mill tract and the other tract above, containing 640 acres, and all my negroes not mentioned, to be equally divided between my two sons, William Harris and my son Robert Harris, and my daughter, Sarah Gillis, and the heirs of my son Lawson Harris, deceased, and the rest of my property, wagon, still, etc. It is my desire that my son William shall have thirty acres of land surveyed off from the tract on which I reside, adjoining the tract I have given him, and the balance of the tract to my son Robert, as before recited."

The two sons, William and Robert, were appointed executors. There was much litigation growing out of this will, first, on an issue of *devisavit vel non*, then as to the construction in respect of the manner of dividing the residue with Lawson's children—then this suit was brought, alleging a general waste and mal-administration, which pended in that shape several terms, but, by consent of the parties, the claim was narrowed to the legacy of "three small negroes," given in the fifth item of the will. This claim is resisted on the ground that this legacy had been paid and satisfied by the conveyance of negroes to the children of Mrs. Gillis, in the lifetime of the testator. This conveyance was by a bill of sale, dated November 7, 1845. The effective words of this instrument are, "Know ye, that I, the said Robert Harris, for and in consideration of the love and affection which I have and bear unto my beloved daughter, Sarah Gillis, of the State of Georgia, Cass County, and for divers other good causes and considerations, me hereunto moving, have given and granted, and by these presents do give and grant unto the said heirs

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of the said Sarah Gillis, one negro woman, named Lizzie, Easther, Susan, William and Thomas, and all her increase hereafter," with a clause of general warranty of title. The facts, as gathered from the depositions, in regard to these slaves, are, that Lizzie, the mother, had been accused and taken before a magistrate for burning a tobacco barn, and the charge was compromised by the master's consenting to send the woman out of the State. She was first sent a short distance into (270) Virginia, and then she and her three children were put into the hands of Daniel Gillis, one of the children of Sarah, with the bill of sale, and carried to Cass County, Georgia, where the family resided. There was much testimony as to the intention of the testator in making this conveyance, the effect of which is mentioned in the opinion of the Court. The case was heard upon bill, answer, exhibits and proof.

Graham, for the plaintiff.

Miller, for the defendants.

PEARSON, C. J. We are deeply impressed with the conviction that if the testator could now be asked, "Was it your intention, in addition to the four negroes which you gave to Mrs. Gillis, and the four others which you gave to her children, also to give her three small negroes by your will," the answer would be, "That was not my intention; for my object was to make all my children equal."

If, by the application of the principles of law which have been adopted for the purpose of giving effect to the intention of testators, there should be a failure to give effect to the intention in this particular instance, the reply is, it must be ascribed, not to any defect in the principles of law, but to the unaccountable neglect of the testator.

Assume, as insisted upon on the part of the defendants, that the will was written and signed in 1842, the day of its date. If it was the intention of the testator, by his deed of gift in 1845 of four negroes to the children of Mrs. Gillis, to satisfy the legacy to her of "three small negroes," it was neglect, on his part, not to have that fact set out in the deed. Again, if such was his intention, he was guilty of the most unaccountable neglect in 1847, when the paper was in his presence, formally attested by two witnesses, for the purpose of giving it legal effect, in not then revoking the legacy of "three small negroes" to his daughter, on the ground that he had made her equal to her brothers by the gift to her children.

Law is made for the vigilant and not for the negligent, is a maxim which may be applied as well to those who are giving (271) away property, as to those who are seeking to acquire it. In our case, it was the neglect of the testator not to give evidence of his inten-

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tion, and there is no ground on which it can be presumed. The gift, which is insisted upon as a satisfaction of the legacy, was not of *three* small negroes, but of *four* negroes, one of whom was a grown woman, and the gift was not to the daughter, but to her children, and if parol evidence were competent to show the intention, there is no evidence that at any time the testator declared that the intention was to satisfy the legacy by this gift. In *Howze v. Mallett*, 57 N. C., 194, the testator required the legatee to admit, expressly, in writing, that the money was received in satisfaction of the legacy.

The conclusion that the legacy was not adeemed by the gift, is irresistible on principles well settled—putting the case on the supposition that the paper was signed by the testator in 1842 (as to which there is no proof). On the supposition that the paper was not signed until after the gift, there is no ground on which to base an argument in support of an ademption. So, taking it either way, the defendants have failed to establish the allegation that the legacy is satisfied.

There must be a decree that the plaintiffs are entitled to the value of the three small negroes, to be fixed two years after the death of the testator, with interest from that date; as to which, there will be a reference.

PER CURIAM.

Decree accordingly.

Cited: Chambers v. Kerns, post, 282; *Millsaps v. McLean*, 60 N. C., 82; *Leathers v. Gray*, 101 N. C., 166.

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SUSANNAH CLARK and others against JOSEPH BELL, Executor.

Where a negro woman slave was willed to one for life, and then to be free, and such slave formally elected to remain a slave, it was *Held*, that the *status* of such woman, after such election, was fixed as from the testator's death, and that her offspring, born after that event, remained slaves, and that she and her offspring passed by a residuary clause of the will.

CAUSE removed from the Court of Equity of CHATHAM.

The only questions in this cause grow out of the provisions of the will of Elijah Bell, taken in connection with the fact that the woman formally refused to accept of the boon of freedom, offered to her by the will of her late owner. The whole matter is sufficiently set forth in the opinion of the Court.

No counsel appeared for the plaintiffs in this Court.

Phillips, for the defendant.

MANLY, J. The bill is filed to obtain a construction of the will of Elijah Bell, in respect to the disposition made therein of the woman

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Louisa, under the present circumstances of her case. The clauses of the will material to the enquiry are the fourth and ninth, which are, respectively, as follows:

"4th Item. I give and bequeath to my sister, Susannah Clark, during her natural life, a certain negro girl, by the name of Louisa, and after the death of my sister as aforesaid, I direct and request that the said negro girl, Louisa, be set free."

"9th Item. I give and bequeath to my brother, Thomas Bell, all the residue of my property, both real and personal, that I have not heretofore given away, to him and his heirs, in fee simple forever."

An enquiry has been made, under the direction of the Court below, from which it appears that the woman is unwilling to accept of freedom upon the condition of leaving the State. This enquiry has been conducted with such apparent care, that the Court is satisfied with the result. Under these circumstances, the Court is called upon to declare what disposition should be made of the woman and her (273) children, born since the death of the testator.

It will be seen by reference to our statute laws, Rev. Code, ch. 107, secs. 45, 46, 47, 53, that emancipation can only be effected in certain prescribed forms, and upon the condition of the manumitted slaves leaving the State not to return.

It is said in *Hogg v. Capehart*, reported in a note to *Feimster v. Tucker*, 58 N. C., 71, that freedom will not be forced upon any one. It is not the policy of the law to do so. It, therefore, follows that the refusal of the woman to leave the State, that is, to accept of the bequest of freedom upon the conditions which would make it lawful, frustrates and makes void the bequest. The children of the woman Louisa were born after the death of the testator. The election of the mother, by which the bequest becomes void, determines the *status* of her offspring. The will is fixed by the death of the testator, and is considered to take effect and determine the state of the property as from the death. Her election (although subsequent) not to conform to the requirements of law, made the bequest void from the beginning, and the right of emancipation, which she might have claimed, has not inured to the benefit of her children.

The mother and children, then, falling back into the estate, the remaining enquiry is, do they go to the next of kin, as property undisposed of by the will, or do they pass to the residuary legatee?

After due consideration of the contents of the will, we see no sufficient reason for withholding them from the residuum.

A general gift of the residue includes legacies not effectually disposed of, whether they fail by lapse or by illegality, unless it be clear upon the will that the intention was different.

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We do not suppose that the testator expected this, or any other provision of his will, to fail and fall into the residuum, but the rule of the Courts is that such will fail there, unless it shall appear from the restricted terms of the residuary clause itself, or from other (274) parts of the will, that this was not his intention; *Sorrey v. Bright*, 18 N. C., 113.

PER CURIAM.

Decree accordingly.

JOHN C. CAMP and another against WILLIAM S. MILLS and others.

A bill in equity, for a discovery and an account, by one of two wards against one of two joint guardians, alleging that he had, exclusively, received the estate of the wards, in which bill the other guardian is made plaintiff, and the other ward defendant, is not multifarious.

CAUSE removed from the Court of Equity of POLK.

The bill is filed in the names of John C. Camp and Columbus Mills against William S. Mills and William A. Mooney and Sarah Louisa, his wife, alleging that John C. Camp and Sarah Louisa Mooney are the only surviving children and heirs at law of James T. Camp, who died intestate in the year 1841, and that the plaintiff Columbus Mills and the defendant William S. Mills became their joint guardians, and entered into a joint bond in the sum of \$20,000, with Govan Mills as their surety; that the defendant William S. Mills took possession of the property of the wards, consisting of lands and slaves; rented out the land and received the rents, and hired out the slaves and received the hires, during the whole period of the minority of the said wards, and that the said Columbus Mills did not at all interfere in the management of the wards, or their estates, or the incomes thereof. The bill states that the said Sarah Louisa intermarried with the defendant William A. Mooney in the year 1857, and the plaintiffs are ignorant whether any settlement, partial or complete, was ever made between her and her husband and the said W. S. Mills; that the plaintiff J. C. Camp became of age in the year 1854; that they are ignorant as to what amount of rents, hires (275) and other estate of the wards came into the hands of the said W. S. Mills, and the prayer of the bill is for a discovery and for an account as to both of the wards, so that the plaintiff J. C. Camp may recover what is due to him, and the other plaintiff may be discharged of his liability on account of his joint guardianship with the defendant W. S. Mills, both as guardian for the plaintiff John C. and for the defendant Sarah Louisa Mooney.

To this bill the defendant W. S. Mills demurred, on account of multifariousness.

The cause was set for argument on the demurrer and sent to this Court to be heard.

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Dickson, for the plaintiffs.

Shipp and Phillips, for the defendants.

BATTLE, J. It appears from the bill that the plaintiff Columbus Mills and the defendant William S. Mills were, in 1842, duly appointed joint guardians to the plaintiff John C. Camp and the *feme* defendant Sarah Louisa Camp, and to secure the faithful discharge of the duties of their office, gave a joint bond in the penal sum of \$20,000. If, after the marriage of the female ward, and the coming of age of her brother, the other ward, a suit in equity were necessary for calling for an account from their guardians, we can see nothing to object, but much to approve, in having it done in one, instead of two or more suits. It is manifest that a bill might have been filed in the name of both wards, as plaintiffs, against both guardians, as defendants, in which the respective rights of each plaintiff and the liabilities of each defendant could have been ascertained upon which a decree might have been founded to secure such rights and to enforce such liabilities, with exact justice to each and all the parties. If one of the wards had declined to become a plaintiff, he or she might have been made a defendant, together with the guardians, and the same result might have been obtained. To a bill in either form, it is certain that the objection of multifariousness would not apply. Such objections may be divided into three classes of cases: 1st, those in which there are different persons plaintiffs or defendants (276) of which some have no kind of privity with others; 2dly, those in which the same party sues or is sued in different capacities; 3dly, those in which the parties are the same, and they sue and are sued in the same capacities, but several and distinct subjects are brought into question.

The present case is clearly excluded from either class; for there is no party that has no kind of privity with the others; there is none that sues or is sued in different capacities, and there are no several and distinct subjects brought into question. See Calvert on Parties to Suits in Equity, 89 (17 Law Lib., 52).

It only remains to see whether making one of the guardians a plaintiff instead of a defendant, varies the case, and we think it does not. If the allegations of the bill are true, as by demurrer they are admitted to be, no relief is sought against Columbus Mills, and there is no necessity that he should have a decree against either of the parties. He is a necessary party to the suit, in order that he may be bound by the final decree in the cause, and he will be equally bound, whether he be a plaintiff or a defendant; see *Wilkins v. Fry*, 1 Mer., 262. It follows that the bill is not multifarious, and the demurrer must be overruled.

PER CURIAM.

Demurred overruled.

CHAMBERS v. PAYNE.

EDWARD R. CHAMBERS, Adm'r, against CHARLES L. PAYNE and others.

1. A bequest of slaves to one, for life, with a limitation over to his or her children *equally to be divided*, is not controlled by the rule in Shelly's case, but confines the interest of the first taker to his or her life.
2. Where children take as a class at the expiration of a life estate, each child takes a vested interest at its birth, subject to be partially divested in favor of the other children of the class as they are born, and upon the death of one of the children during the existence of the life estate, his or her interest goes to his or her representative, and not to ulterior limitees dependent on the first taker's dying without issue.

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CAUSE removed from the Court of Equity of DAVIDSON.

Simon Williams, in 1809, bequeathed as follows: "I lend unto my son, Alanson Williams, and my son-in-law, Anthony Sale, in trust, for the only use and benefit of my daughter, Betsy Payne, during her natural life, against the claim or contract of her present or any future husband, the following negroes and their future increase: Thena and her two children (the names not known), David, Ransom, and Revey; my will and desire is that the negroes and their future increase, lent to my son, Alanson Williams, and Anthony Sale, in trust for the use and benefit of my daughter, Betsy Payne, against the claim or contract of her present husband or husbands, during her natural life, shall be equally divided among the heirs of her body forever; but for want of such, my will and desire is that the said negroes and their future increase be equally divided among my other children or their representatives." Betsy Payne, the legatee herein mentioned, received the slaves bequeathed, and kept them until 1857, when she died, having disposed of the said slaves and their increase (now very numerous) by her last will and testament. The said Betsy Payne had one child, which died in its infancy, many years before her death, and never had any other. The plaintiffs are the brothers and sisters of Betsy Payne and their representatives, and claim by virtue of the limitation over after the death of Mrs. Payne. The defendants claim under the will of Betsy Payne. The cause was heard on bill, answer, proofs, and exhibits.

B. F. Moore for the plaintiffs.

Fowle and Kittrell for the defendants.

BATTLE, J. Had the testator's daughter, Mrs. Payne, passed through life without having had a child, we should not have hesitated to (278) hold that the claim of the other children of the testator, and their representatives, under the ulterior limitation to them, would not have been prevented by the operation of the rule in Shelly's case, in her favor. That rule would have been excluded, either upon the prin-

ciple adopted by the court in *Payne v. Sale*, 22 N. C., 455, on the construction of the same will which we have now before us, or upon that of *Swain v. Roscoe*, 25 N. C., 200. The counsel for the defendant has ventured to call in question the propriety of the decisions in both these cases, and has suggested reasons and produced authorities to show that they would have been ruled otherwise by the English Court, but we do not feel at liberty to impeach them. Indeed, the principle of the latter case has been since confirmed, and must be considered now as a settled rule of construction in this State. Under that principle we hold that Mrs. Payne took a life estate only in the property bequeathed to her.

We come now to consider the case in the event which happened: that she bore a living child, which, however, died in her lifetime. Did that child take any interest in the property, under the limitation, after her life estate, "to be equally divided among the heirs of her body forever." The answer to this question is to be found in the rulings of the Court in *Swain v. Roscoe*, *ubi supra*; *Evans v. Lea*, 40 N. C., 169; *Knight v. Wall*, 19 N. C., 125; *Sanderlin v. Deford*, 47 N. C., 74, and several other cases, including *Mason v. White*, 53 N. C., 421.

From these cases it will clearly appear that in bequests of personal property, like the present, heirs of the body mean children; that when children take, as a class, at the expiration of a life estate, each child takes a vested interest at its birth, subject to be partially divested in favor of the other children as they are born, and that upon the death of one of the children during the existence of the life estate, his or her interest goes to his or her representative, and does not devolve upon the other children by virtue of the limitation unless an intention (279) to that effect is manifested in the will.

Assuming, then, as we must, that Mrs. Payne's child took a vested interest in the property as soon as it was born, the next enquiry is, what was the extent of that interest. It could be none other than the absolute interest which, of course, excluded the ulterior limitation to the testator's own children. This will appear from many cases in our own Reports and particularly from *Sanderlin v. Deford*, *ubi supra*, where the subject is more fully discussed than in most of the others. Upon the death, then, of Mrs. Payne's child, the vested interest which it took in the legacy devolved upon its personal representative, from whom Mrs. Payne or her husband took it as her child's next of kin.

The only case to which the counsel for the plaintiff, in the able argument which he submitted, has referred us, which at all impugns any of the principles we have stated, is *Jarvis v. Wyatt*, 11 N. C., 227. Of that case, it is only necessary for us to remark that the point decided may be supported by the peculiar language of the will, or, if it can not be supported on that ground, it must be considered as having been over-

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ruled by the numerous cases since adjudicated upon that point, to several of which we have already referred.

Believing that the birth of Mrs. Payne's child defeated the ulterior limitation under which the plaintiffs claim, it is unnecessary for us to notice particularly the objection that that limitation is too remote, and therefore void. *Sanderlin v. Deford*, already referred to, would, if its aid were necessary, be a strong authority in favor of such objection. There, the form of expression in the will, "for want of such heirs," is almost identical with that in the will now before us, and it was said by the Court that if the will had been made before the Act of 1827 (as the present will was), the limitation would have been too remote. But it is needless to enlarge upon this question, as, for the reasons given upon another part of the case, we are of opinion that the plaintiffs have (280) no claim to the property in dispute, and their bill must be

PER CURIAM.

Dismissed with costs.

Cited: Britton v. Miller, 63 N. C., 270; *Conigland v. Smith*, 79 N. C., 304; *Leathers v. Gray*, 101 N. C., 167, 168.

JOSEPH F. CHAMBERS, Executor, against JOHN B. KERNS and others.

1. An executor is not liable for interest on money collected by him unless he receives interest on the same.
2. Where an intended legacy of a tract of land was sold by the testator, and a bond given by him to make title, which, however, was not done in his lifetime, it was *Held*, that the intended legatee had no claim upon the proceeds of a note taken by the testator for the purchase money of the land.

CAUSE removed from the Court of Equity of ROWAN.

The bill was filed by the executor of Peter Kerns, praying for instructions as to the discharge of his duty under the will, and for an account and settlement of the estate in his hands by a decree of the Court of Equity for his protection, etc.

A reference was made to L. Blackmer, Esq., as a commissioner to state the account with the executor, which was stated, and was excepted to in two particulars—one of which was that the commissioner had charged the executor with interest on money collected by him and held for distribution. The other exception was that the commissioner refused to pass into the residuary fund a note given by Fisher and others for a certain tract of land, which, in his will, written before that time, was devised to John B. Kerns. On the sale of this land, the testator, Peter Kerns, gave Messrs. Fisher, Craige, Nesbit, and Daniel Kerns a bond to make

them a title on the payment of the purchase money, and took their joint note for \$2,500. It was contended before the commissioner that as the land for which the note was given, was intended for John B. Kerns, in the will of Peter Kerns, he should have the proceeds of the note taken for the same, and that it should not fall into the residuum, (281) and the commissioner so held—for which Caldwell and wife and other residuary legatees excepted. The cause was set down for argument on the exceptions and sent to this Court.

R. A. Caldwell for the plaintiffs.

J. E. Kerr and Boyden for the defendants.

PEARSON, C. J. The exception in respect to the note of Fisher and others, for \$2,500, given to secure the price of a tract of land sold to them by the testator, is allowed.

By a residuary clause, the testator directs “the money on hand and the money arising from the collection of my bonds, notes and accounts, be equally divided between my wife, Fanny,” etc. These words include the note of “Fisher and others,” and the question is, on what ground should this note be taken out of the express words of the residuary legacy? The ground assigned is that this note was given as the consideration of a tract of land which, by the third clause of the will, is devised to John B. Kerns, and which the testator, after the execution of the will, sold to “Fisher and others,” giving his bond for title when the purchase money was paid.

We confess we are unable to see the force of this position. Suppose the testator, when he sold the land, had been satisfied with the security of the note and passed the title by making a deed to “Fisher and others,” John B. Kerns would not, most manifestly, have been entitled to the note. Because the sale of the land devised to him was a revocation of the devise. The fact that the testator did not see proper to make a deed to Fisher and others, but chose to retain the title as security for the payment of the note, does not, in any way, alter the case in respect to this question of revocation; for the plain reason that in the one case, as well as in the other, he had ceased to be the owner of the land which was the subject of the devise.

It is a familiar principle of equity, acted upon every day, *i. e.*, by a contract to sell land, the purchaser becomes the owner and the vendor holds the title in trust for him on payment of the (282) purchase money; so that any appreciation of the value is the gain of the purchaser, and any depreciation (by burning of the buildings, etc.) is his loss. In other words, the effect of a contract of sale is to make the vendee the owner of the land, the title being retained by the vendor as a security of the purchase money.

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These are well settled principles of law, and if by their application the intention of the testator is disappointed, the Court can say it is not the fault of the law, but the neglect of the testator in not adding a codicil to set out his intention, made necessary by the alteration in the condition of his estate, caused by his act of selling the tract of land devised to John B. Kerns; see *Gillis v. Harris, ante*, 267.

Whether the purchasers of land in a bill for the specific performance on payment of their note must call for a conveyance from the heirs at law of the devisor, or from the devisee, is a question not now presented; it is certain that the title, no matter whether it has descended to the heirs at law or passed under the will to the devisee, is held merely as a security for the payment of the purchase money, and that the ownership and beneficial estate vested in the purchasers by force of the contract of sale, and the legal title is held in trust for them on payment of the purchase money.

The exception in respect to the charge of interest is allowed so far as there is a charge of interest for cash on hand. An executor is not expected or allowed to invest cash on hand so as to make interest, and is not chargeable for interest, unless it be proved that he has made interest. Of course, he is chargeable with interest on the sale notes from the time they fell due, as he is presumed to have collected it on all such notes as were not promptly paid.

PER CURIAM. The account will be reformed accordingly.

Cited: Rue v. Connell, 148 N. C., 306.

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BENTON RAY, Adm'r, and others against EDWARD M. SCOTT and others.

A suit in equity seeking to set aside a deed, because of incapacity on the part of the bargainor, and fraud and imposition on the part of the bargainee, is not for the same matter as one alleging that a deed was intended to be only a contract to convey on payment of the purchase money, and was erroneously worded, because of the ignorance, mistake or fraud of the draftsman, and a plea alleging the matter of the former suit in bar of the second, was overruled.

CAUSE removed from the Court of Equity of ORANGE.

The bill alleges that Moses Leathers agreed with the defendant Scott that he would sell him the tract of land in question, lying on Eno River, at the price of \$2,000, whenever the purchase money for the same was paid to him, and that such purchase money was to be paid within thirty days thereafter, and that the parties proceeded, as he supposed, to reduce this contract to writing, and that a writing was

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then and there prepared by the defendant Edward M. Scott, which he supposed was an instrument embracing the terms of their contract as above set out, but that in fact and in truth the instrument was an absolute conveyance of his land to the said Scott in fee simple; that this departure was by the mistake, ignorance or fraud of such draftsman; that the instrument in question is not formal in its terms, and was well calculated to mislead Leathers, who was himself ignorant and unacquainted with the business of conveyancing; that Scott paid him no money then, nor has he since paid him any; that the said Scott was well known to him to be at the time utterly insolvent, and that he never would have thought of selling him his only tract and homestead without some security for the purchase money. The bill further alleges that the said Scott has conveyed the land in question to the defendant Webb, as a trustee, to secure the debts of the other defendants, Sims and the McCawns, and that they had notice of Leathers' equitable claim; that the said trustee has sued him in an action of ejectment, and threatens to turn him out of possession. The prayer is that the deed in question may be reformed, and that it may stand, as it was intended to be, a bond to sell and convey the land in question (284) to the said Scott on the payment of the purchase money, and that the defendants may be enjoined from proceeding at law to oust him of his possession, and for general relief.

This suit was originally instituted in the name of Moses Leathers, but his death having been suggested, Benton Ray, his administrator, and the children and heirs at law of the said Moses, by their next friend, the said Benton Ray, were made parties plaintiff. The defendants pleaded in bar that the plaintiffs' intestate, Leathers, had, before the commencement of this suit, brought suit in the Court of Equity, alleging that Scott and Sims, being both very desirous of getting his land, came to his house, and finding him in a debauch of several days duration, when he was totally unfit to make a contract, persuaded him to sign a paper, the contents of which he was too drunk and stupefied to know and understand, but which turned out to be a deed in fee simple to Scott for his land for \$2,000 which, it was expressed in the said instrument, the said Scott was thereafter to pay; that the land was afterwards conveyed by Scott, in trust, for the benefit of Sims and the McCawns, and that the whole transaction was in pursuance of a fraudulent combination between Scott, Sims and John and William McCawn, the prayer of which former bill is stated to be for a declaration that such deed is void for the fraud, and that it be surrendered for cancellation. The plea avers the identity of the parties and of the cause of action, and concludes in bar of the said suit.

The cause was set for argument on the bill and plea of defendants.

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Graham, for the plaintiffs.

Phillips, for the defendants.

PEARSON, C. J. The only question presented is this: Taking the matters alleged in the plea to be true, is the equity which the plaintiffs seek to set up by their bill now filed, the same as the equity (285) which the intestate attempted to set up in the first bill, and which was adjudged against him; in other words, does this bill seek to enforce the *very equity* which has been adjudged and decided by the decree in the first suit.

Upon this argument the Court is confined to the matters alleged in the bill and the matters set out in the plea, and for this reason, very great particularity is required in framing the plea. Without deciding whether this plea is informal in this, that it does not set out, in so many words, the bill in the first case, and does not set out the decree in that case, but simply states the substance and effect and material parts of the bill and decree, we put our decision on the ground that the equities are not the same, and that the equity of the bill, now before us, was not adjudged by the former decree.

The equity, which the bill seeks to set up is that the intestate of the plaintiffs, having made a contract to sell his land to the defendant, Scott, the intention was to reduce the *contract of sale* to writing, and in drafting the writing, either by the mistake or the ignorance or the fraudulent design of the draftsman, who was the defendant, Scott, the paper was so worded as to be a *conveyance* of the land instead of a *contract to convey* on the payment of the purchase-money.

The equity of the first bill was, that the plaintiffs' intestate never intended, either to convey, or to contract to convey, his land, and that he was induced to sign and execute the paper, at a time when, from the effects of drinking, he was incapable of making a contract, and so the deed was obtained from him by fraud, and was void by reason of his incapacity.

These equities are wholly distinct and different: The first bill would have made the deed void and of no effect, against all persons, either as a contract to convey, or as a conveyance of the estate, or any part of it. This bill seeks to make the deed void as a conveyance, but establishes it as a contract to convey upon the payment of the purchase-money. Let the plea be overruled and the defendants be required to answer.

PER CURIAM.

Plea overruled.

(286)

CAIPHAS QUICKEL and another against C. C. HENDERSON and others.

A bond to indemnify the surety of A against all notes, bonds, etc., signed and entered into for B, extends to notes, bonds, etc., signed and entered into for B & Co.

THIS cause was removed from the Court of Equity of LINCOLN.

The testator of the plaintiffs, Jacob Killian, was the creditor of Barrett & Co., by a note signed by Barrett & Co., as principals, and J. A. Ramsour as surety, upon which suit was brought, judgment obtained, and execution issued against each of the partners and against the surety, and returned *nulla bona*, and it was admitted that these parties were, and still are insolvent. After this note was given, to wit, in 1857, the plaintiff, Ramsour, for his indemnity against the liabilities he had incurred for E. S. Barrett, took a penal bond in the sum of \$20,000, with the other defendants, Briggs, Hoyle and Henderson, as sureties, payable to him, the said Jacob A. Ramsour, and conditioned as follows: "Whereas, the said Jacob A. Ramsour hath heretofore bound himself by bills, bonds and notes, for the payment of various sums of money, as the security of Elisha S. Barrett, now, therefore, if the above bounden, E. S. Barrett, shall well and truly pay off and discharge each and every of the said bills, bonds and notes, in and by which the said Jacob A. Ramsour, is bound as aforesaid, for the said E. S. Barrett, on or before the . . . day of 185., or shall on or before the day aforesaid, in anywise discharge and save harmless the said Jacob A. Ramsour from any and all liabilities, debts, contracts or charges, for or on account of all said bills, bonds, and notes, then, the above obligation to be void, otherwise to remain in full force." Signed by E. S. Barrett, B. F. Briggs, C. C. Henderson and L. A. Hoyle, with their seals affixed, and delivered to the said Ramsour.

The plaintiffs, called on these obligors to indemnify Ramsour, the obligee, by paying this note to the executor of Jacob Killian, but this was refused, on the ground, that as J. A. Ramsour is insolvent and can not pay anything, therefore, he can not be indemnified, and again, for that the indemnity extends only to liabilities incurred by E. (287) S. Barrett, and not such as had been incurred for E. S. Barrett & Co. The defendants demurred, and the cause being set down for argument on the demurrer, was sent to this Court.

Fowle, for the plaintiffs.

No counsel for the defendants in this Court.

MANLY, J. Two grounds are relied upon to sustain the demurrer in this case.

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1. That there has been no breach of the conditions of the bond by actual or probable loss on the bond of the complainant, Ramsour, and

2. That the bond is for the indemnity of Ramsour as surety of E. S. Barrett, and does not extend to cases in which Ramsour is surety of Barrett & Co.

The first of these grounds seems to be disposed of by *Ferrer v. Barrett*, 57 N. C., 455, which was a bill similiar, in all respects, to the one before us, where the same ground of demurrer was taken, and after full consideration overruled. We content ourselves by a reference to the reasoning in that case.

The second ground is also untenable. There is nothing in the language of the bond to restrict the indemnity to obligations in which Barrett is sole principal, and we can perceive no reason for such restriction. The individuality of co-partners is preserved and is not merged as in incorporated societies. Each is responsible, severally, for the debts of the company, and it is not less the debt of Barrett, nor is Ramsour less the surety, because others, beside Barrett, are responsible upon it as principals.

PER CURIAM.

Demurrer overruled with costs.

Cited: Moore v. Henderson, 116 N. C., 669.

(288)

W. G. BOWERS and wife against EDMUND STRUDWICK and others.

A mortgagee having agreed with the wife of the mortgagor, that upon a part of his debt being satisfied, he would assign for her benefit, his interest in the debt, and the property mortgaged, and in pursuance thereof, having assigned the same to a third person, *Held*, that the assignee was entitled to enforce against the wife's legatees, an agreement, by which, at the time she was soliciting him to aid her in securing the benefits, she engaged that upon her death, her interest in the property mortgaged, should be subjected to pay the debts due to such assignee by the mortgagor.

CAUSE removed from the Court of Equity of ORANGE.

The pleadings and evidence in this case, showed that John Witherspoon was indebted to Charles J. Shannon, in a sum, which, in 1853, amounted to about \$5,500, and, that to secure it, he had, in 1837, given a mortgage upon sundry slaves. In 1853, he was also indebted to Edmund Strudwick, in the sum of about \$5,000, which had accumulated during a period of twenty-five years.

In 1853, Mr. Shannon was induced, from friendship, to Mrs. Susan Witherspoon (wife of John Witherspoon), to consent that if the principal of his debt (about \$2,750), were paid or secured, he would assign

his interest in the mortgaged property for her benefit. At this time, the slaves were worth about \$4,500. Mrs. Witherspoon, thereupon, persuaded Edmund Strudwick to secure said debt, engaging, that if he would do so, she would provide, that after her death, the slaves should be applied to the payment of the debts due to him, as above stated. Henry K. Witherspoon was to join Strudwick in this arrangement, becoming jointly bound, and sharing in the benefits; but afterwards, for a reasonable consideration, he assigned his interest therein to Strudwick. Thereupon, Mr. Shannon, the principal of his debt having been secured, through the intervention of Strudwick, gave a bond to the latter (Henry K. Witherspoon being connected with the transaction, as above set forth), providing for the transfer to him of the debt and mortgaged property, upon the *payment* of what had been secured. This payment was afterwards made; about \$1,100 of it coming from the means of Strudwick. (289)

Owing to some differences between Mrs. Witherspoon and Strudwick, the whole matter was left to the award of John W. Norwood, Esq., who, as a preliminary, ordered Shannon to convey the slaves to Strudwick, and reserved the other points for further consideration. The conveyance was made, but, before the arbitrator had settled the matter, Mrs. Witherspoon died (early in 1854), having survived her husband but a short time. Thereupon the arbitration came to an end. Mrs. Witherspoon made a will, under which her daughter Mary, wife of the plaintiff, William G. Bowers, received an interest in her estate; and Strudwick qualified as administrator, with the will annexed, at August Term, 1854, of Orange County Court.

In June, 1854, John K. Witherspoon, who was duly authorized to do so, by all the next of kin, and legatees of Mrs Witherspoon, excepting the plaintiff, Mary, made a settlement with Strudwick, whereby, in consideration that he released his debts against John Witherspoon, deceased, all the slaves except Virgil were transferred to said Strudwick. Virgil was, by that arrangement, reserved for the use of the complainant, Mary, who was, at that time, some twenty-three years of age, but was absent in Philadelphia. She intermarried with Bowers in the latter part of 1857.

The bill which was filed to Spring Term, 1858, of the Court of Equity for Orange County, prayed that Strudwick should be declared a trustee of Mr. Shannon's interest in the property mortgaged, so far as it had not been exhausted in paying Mr. Shannon's principal money, for the benefit of Mrs. Witherspoon's estate; that the slaves should be sold, and if there were anything left, after satisfying the original debt due Mr. Shannon, it should be paid to W. G. Bowers, as administrator, of John Witherspoon, deceased, and for other relief.

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The cause was set for hearing, at Spring Term, 1861, of Orange Superior Court, and ordered to be transmitted to the Supreme Court.

(290) *Graham*, for the complainant.

Phillips, for the defendant, Strudwick.

PEARSON, C. J. By the accumulation of interest, the mortgage-debt exceeded the value of the slaves; so it is assumed on both sides that Doctor Witherspoon's equity of redemption being of no value, was abandoned, and may be put out of the consideration.

The equity of the plaintiff is put on the ground that the claim of Doctor Strudwick to hold the negroes as a security for the debts due to him by Doctor Witherspoon, according to the understanding and agreement made between him and Mrs. Witherspoon, should not be allowed, because it would disappoint the expectations of Mr. Shannon, whose sole object in agreeing to transfer the mortgaged negroes on payment of the principal of his debt, and to forgive the accumulated interest, was to benefit Mrs. Witherspoon exclusively, and so the claim made by Dr. Strudwick, if allowed, would be a fraud on Mr. Shannon.

The doctrine that a court of equity will not enforce the performance of an agreement made in fraud of a third person, is a familiar one, but it is based upon a very refined principle—difficult of application to the ordinary transactions of life, and is put upon the ground of preventing *positive* and *actual* fraud.

Our opinion is against the plaintiffs. Mr. Shannon, upon the facts of the case was not the mere dispenser of a charity. He had a prudent regard to his own interest; and the amount of it is this: he was willing, in order to avoid the necessity of enforcing his rights as mortgagee, and the embarrassments to which he would have been subjected in taking the negroes out of the possession of Dr. Witherspoon and of Mrs. Witherspoon, owing to the peculiar relations of respect, etc., existing between them, to forgive the accumulated interest on his debt and to transfer and assign his right and title under the mortgage, provided the principal of his debt was paid, or security for prompt payment was given; with the understanding that any of the mortgaged negroes that could be retained by this arrangement should be held for the (291) benefit of Mrs. Witherspoon.

The question is: As Mrs. Witherspoon, in order to comply with the condition which Mr. Shannon annexed to his bounty, to wit, the immediate payment or security for the prompt payment of the principal of his debt, was under the necessity of coming to an understanding with Dr. Strudwick, that if he would enable her to perform the condition imposed by Mr. Shannon, and would allow

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her the full use of the property during her life, he should, after her death, hold the negroes as a security for the debts due to him by Dr. Witherspoon, does the doctrine of preventing a fraud apply to the case and forbid the Court from allowing the agreement made between Dr. Strudwick and Mrs. Witherspoon from being acted on and carried into effect by Dr. Strudwick, who has acquired the legal title?

We are of opinion that the doctrine that equity will not enforce an agreement in fraud of a third person does not apply to the case.

Mr. Shannon was generous in agreeing to forgive the accumulated interest, but by stipulating that the principal of his debt must be paid, or its prompt payment be secured, he gave up the right to be considered in the light of a mere dispenser of a bounty, because he imposed a condition, and, of course, expected that Mrs. Witherspoon would be under the necessity of making some agreement or arrangement in respect to the property, to enable her to comply with the condition. Doctor Strudwick, in the exercise of a spirit of generosity, equal to that of Mr. Shannon, aided Mrs. Witherspoon, and enabled her to comply with the condition. What ground is there to support the allegation that when Doctor Strudwick, as a condition to the aid which he was about to render, stipulated that after the full enjoyment of the property by Mrs. Witherspoon during her life, it should then stand as a security for his debts due by Dr. Witherspoon, he perpetrated a fraud upon Mr. Shannon, and on that account should not be allowed to have the benefit of the arrangement made between him and Mrs. Witherspoon? We can see none, either in law or equity or morals. (292) Mr. Shannon made no stipulation in behalf of the *children* of Mrs. Witherspoon. His object was, after securing, without further embarrassment, the payment of the principal of his debt, to secure to Mrs. Witherspoon the full enjoyment of such of the mortgaged negroes as could be saved, after a compliance with his terms. These were complied with, and his obligation to transfer all of his right and title under the mortgage deed on the payment of the residue of his principal money, was absolute, and without any declaration of trust in favor of the children of Mrs. Witherspoon, or any other stipulation with a view of restricting Mrs. Witherspoon from the privilege of making an agreement necessary to enable her to comply with his terms. A payment of a part of a debt is not a *satisfaction* of the whole, as between the creditor and debtor, but when a third person comes in and assumes the payment of a part, in satisfaction of the whole, the case is materially altered, and there is then no reason on which the creditor can object to an agreement which the debtor was under the necessity of making, in order to enable him to pay the part required.

So, in the view we take of the case, Dr. Strudwick has not been

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guilty of any *positive or actual fraud*, so as to entitle the plaintiffs to take the ground that a court of equity ought not to allow him to insist on the arrangement by which the negroes, after the full enjoyment of Mrs. Witherspoon, during her lifetime, were to be held by him as a security for his debts; but we are satisfied that Dr. Strudwick, so far from having perpetrated a fraud, either on Mr. Shannon or the children of Mrs. Witherspoon, has acted the part of a friend, and by making himself liable to Mr. Shannon for the principal of the debt, and thereby securing to Mrs. Witherspoon the full enjoyment of the negroes embraced by the mortgage, has entitled himself to an equal share of credit in acting as the friend of Dr. Witherspoon and Mrs. Witherspoon and the family. Indeed, the equity which the bill seeks to set up under cover of the bounty of Mr. Shannon to Mrs. Witherspoon, is (293) based on the idea that his intention was to restrict her full enjoyment in this: Mrs. Witherspoon was not to be at liberty to dispose of the negroes, as seemed right to her, according to her convictions of justice and moral duty, but she was obliged to forego all such obligations and allow the negroes to devolve on her distributees, under the statute of distributions, unless she saw proper to make a will and give them to her children in proportions differing from the manner in which they would have been entitled under the statute. This assumption of the right, on the part of Mr. Shannon, to control the free agency of Mrs. Witherspoon in disposing of the negroes, is inconsistent with the idea of making her the absolute owner, and is contradicted by the face of his bond.

The effect of the bond of Mr. Shannon, dated 27th December, 1847, to Dr. Strudwick (II. K. Witherspoon having released his right under the bond, may be put out of the case), was to give Dr. Strudwick a right to an absolute conveyance by Shannon of all his right and title to the negroes under the mortgage, on the payment of \$1,500. Strudwick, under this bond, had a right to call for an absolute conveyance of Shannon's title without any declaration of trust, either in favor of Mrs. Witherspoon or of her children. So, the deed executed by Shannon in pursuance of the award of Mr. Norwood, was simply a performance of the obligation imposed on Mr. Shannon by his bond—the sum of \$1,500 having been paid to him.

Thus, the legal title passed to Dr. Strudwick, subject only to the parol trusts, admitted by his answer, as growing out of the understanding between him and Mrs. Witherspoon; that is, to allow Mrs. Witherspoon to have the full use of the negroes during her life, and then in trust as a security to Dr. Strudwick for the debts due him by Dr. Witherspoon, leaving a resulting trust in favor of Mrs. Witherspoon after the payment of the debts due to Dr. Strudwick.

SEALEY v. BRUMBLE.

By her will, Mrs. Witherspoon disposes of her interest among her children, giving a part to Mrs. Bowers, one of the plaintiffs. (294)

In June, 1854, after the death of Mrs. Witherspoon, all of her children, except the plaintiff, Mrs. Bowers, made a full settlement with Dr. Strudwick of all matters growing out of this and other transactions, as appears by a deed executed by the parties of that date, by which Dr. Strudwick releases all of his debts of every kind, and takes the negroes not before disposed of, *except Virgil*, as his absolute property.

Mrs. Bowers was not a party to this arrangement, and the question is, has her claim, under the bequest by her mother's will, to set up the resulting trust after the satisfaction of the debts due to Dr. Strudwick, been waived, or released, or surrendered, in any manner.

It is said this result has been effected by her acceptance of the negro *Virgil*, and by several letters of hers to Mr. Norwood, which are exhibited.

Without discussing the questions made in respect to her mental capacity, it is only necessary to say that it does not appear that in accepting *Virgil*, or while writing the letters, she had a full knowledge of her rights, and there is no evidence that she ever did or said anything with an intent to confirm the settlement made by her brothers and sisters with Dr. Strudwick, and there is nothing to show that she did not receive *Virgil*, supposing him to be a part of her legacy under her mother's will. The plaintiffs have an equity to redeem the negroes and to set up the resulting trust after the payment of the debts due by Dr. Witherspoon to the defendant, Dr. Strudwick, and to this end are entitled to an account, on the footing that *Virgil* is to be considered part of the property liable, in the first instance, to the payment of the debt of Dr. Strudwick. So they will take an order for an account, or will submit to have the bill dismissed, as they may be advised.

PER CURIAM.

Decree accordingly.

Cited: S. c., 60 N. C., 612.

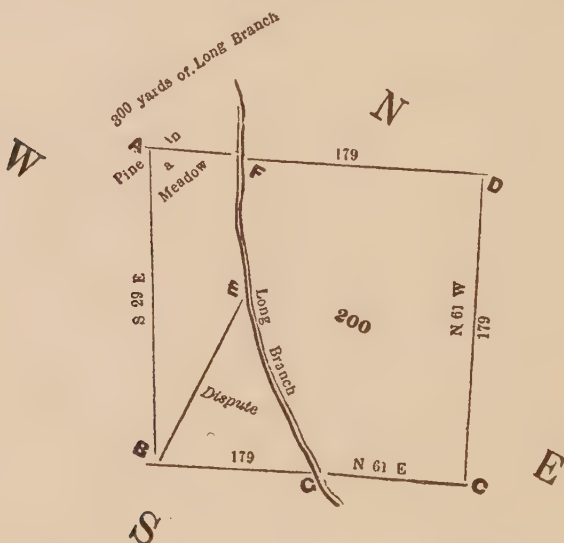
(295)

MOORE T. SEALEY against GILBERT BRUMBLE and JOEL BRITT.

Where land, which was sold to A under a mistaken description, was afterwards conveyed by the same owner to B by a proper deed, for a valuable consideration, without notice to B of the mistake, it was *Held*, that a bill to reform the former deed and correct the error, would not lie against either A or B; but it appearing that A had got paid for part of the same land twice, he was not allowed to recover costs on the dismissal of the bill.

CAUSE removed from the Court of Equity of ROBESON.

One Isham Cox conveyed to defendant Gilbert Brumble the tract described in the plat annexed, A, B, C, D, also another tract adjoining Gilbert Brumble, who sold and conveyed to one Ward a part of the first mentioned tract purporting to be 100 acres, by metes and bounds, as follows: "First survey containing 100 acres, beginning at a pine, in a meadow, about 300 yards south of Long Branch (A), running south 29 degrees east 179 poles to a stake, two sweet bays and two water



oaks, in the edge of the ten mile swamp (B); then *north to the hill of the Long Branch* (E); then the various courses of the hill of the (296) Long Branch to the upper line (F); thence to the beginning, containing one hundred acres, be the same more or less." The plaintiffs allege that the call of the second line, B, E. is a mistake in the draftsman, and should have been *N. 61 E. to the hill of the Long Branch*, which would have carried it to G. The proofs show that in the original deed from Cox to Brumble such was the course, and that by that course the hill of Long Branch was passed at G; that by running from B to G, 100 acres would be embraced, but that by going to E, only about 50 would be the amount; that Brumble had, for many years, recognized B, G, as the line, and the area B. G, E, had been claimed by Ward, and those claiming under him down to the plaintiff Sealey, whose deeds all followed the one above described. Brumble sold all of the lands contained in his deeds from Cox, embracing the whole area

A, B, C, D, to the defendant Joel Britt, not at all noticing the part he had conveyed to Ward.

The deed from Brumble to Ward omits the words of inheritance, necessary to convey a fee simple, which the plaintiff also says was a mistake, and prays to have that rectified.

The plaintiff alleges that he came in for a valuable consideration under Ward by a line of conveyances, describing the land in the same mistaken terms as are embraced in the deed to Ward.

The prayer is that the mistake be corrected by the insertion of the proper course from the second corner; also, that the deed may be corrected as to the words of inheritance, and for general relief.

Brumble denies that the mistake exists as to the course of the second line, but as to the omission of the word heirs, he admits the mistake, and avers his willingness at all times to have corrected it.

Britt insists in his answer that he was a purchaser of both these tracts of land at a full price, without notice, and there is no proof filed that he did have notice of the equity of plaintiff.

The cause was heard on bill, answers, proofs and exhibits. (297)

Leitch and M. B. Smith, for the plaintiff.

Shepherd, for the defendant.

PEARSON, C. J. Britt is a purchaser for valuable consideration, without notice of the alleged mistake. He paid the price and took a deed for the whole tract of 200 acres, according to the original boundaries, with a warranty as to the whole tract; so it is hard on him to be obliged to give up the part actually covered by the deed under which plaintiff claims, and fall back on the warranty. In respect to the part which the plaintiff alleges ought to be included because of a mistake, he may well take the benefit of the maxim, "When the equities are equal, the law must prevail." The bill must therefore be dismissed as to him.

Brumble, by his answer makes an issue on the allegation of a mistake in respect to the boundary. But as the title has passed out of him and vested in Britt, we are relieved from the necessity of deciding this issue, because, in reference to the title, any correction or deed which he might be required now to make would be inoperative and of no effect, and the bill is not framed with a view to any ulterior remedy for breach of warranty. There is no allegation that the deed under which plaintiff claims contains a warranty, and of course no secondary relief in aid of a resort to an action at law on a warranty, if one had been made, can be decreed. The bill must, therefore, be dismissed as to this defendant, also, so far as it relates to the mistake alleged in respect to the boundary.

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The mistake by reason of the omission of words of inheritance being admitted, the plaintiff is, of course, entitled to a decree against the defendant Brumble to have the deed corrected, and as he admits the mistake, and avers a willingness at all times to have corrected it, the plaintiff would have been required to pay the costs according to the course of this Court, but the conduct of the defendant Brumble in selling and receiving pay for the same land twice, which he certainly did (298) as to the part of the land not drawn in question by the alleged mistake, and his avoiding the question in reference to the mistake as to the boundary by the transfer of the title to his co-defendant takes from him all right to claim costs.

As the decree dismisses the bill so far as the defendant Britt is concerned, and also as to the defendant Brumble except as to the mistake in respect to the words of inheritance, the objection taken on the hearing on the ground of multifariousness is avoided.

Indeed, after the expense and delay of preparing a case for hearing has been incurred and taken place, the Court would not be inclined to put the case off on a ground which does not affect the merits of the controversy.

The bill will be dismissed as to Britt, with costs, and will be dismissed as to Brumble so far as it relates to the alleged mistake in respect to boundary, without costs; and there will be a decree, without costs, against the defendant Brumble for the execution of a deed with words proper to pass a fee simple estate, so as to correct the mistake in that particular.

PER CURIAM.

Decree accordingly.

THE ATTORNEY-GENERAL against CALEB OSBORN et al.

1. Where a grant of 3,000 acres of land was made as a bounty under the Act of 1788, in respect to a particular seat for iron works, it was *Held*, that such a grant was appendant to the seat, and exhausted the bounty intended to be given by the statute; so that one who afterwards became owner of the seat, and rebuilt the works there, after the former works had gone down, and were abandoned, had no right to another bounty, in respect of such seat, and that a second grant for bounty in such a case was void.
2. Whether the requirements of the statute of 1788, Rev. Statutes, chapter 75, in regard to making the entry—its return to the county court, the order of survey and the appointment and report of a jury should be strictly complied with as a condition precedent to the issuing of a grant, or whether such matters are merely directory, and do not affect the validity of the grant.—*Quere*.
3. Whether a grant, which includes within its boundaries, a large scope of country, say an area of ten miles by seven, but which in its face, purports to be for 3,000 acres of vacant land, the excess being included in older patents is void.—*Quere*.

CAUSE removed from the Court of Equity of ASHE. (299)

This is an information, filed in the name of the Attorney-General, to vacate and set aside a grant of 3,000 acres of land.

The grant was taken out under the provisions of an act of the General Assembly, passed in the year 1788, entitled, "An act concerning iron and gold mines." See Rev. Statutes, Chap. 75. The information alleges various grounds upon which it is sought to set aside this grant:

1st. That the entry taker failed to transmit a copy of the entry to the next term of the County Court, after it was made.

2d. That a subsequent County Court ordered a warrant of survey, without sufficient proof that the requisite amount of iron had been made at defendant's iron works.

3. That the record made of this transaction in the County Court is altogether irregular, defective and void.

4th. A paper which is relied on as being the report of the jury, is in evidence, and it shows that it was signed by two or three names not contained in the order appointing the jury, and then the said report is ordered to be confirmed. Various other irregularities in the entries of the County Court are set forth in the information, but in the view taken by the Court they need not be stated here.

5th. That the surveyor appointed to make the survey did not make any actual survey, but made out a plat, arbitrarily, without doing so.

6th. That the whole proceeding, embracing the plat of survey and the grant, is delusive and fraudulent; that they embrace, in their exterior boundaries, at least 45,000 acres of land, and profess to take only such land as had not been granted by older grants, which is set down at 3,000 acres, whereas, the information alleges, and the proof shows, that there was in the grant at least eight thousand acres (300) of unappropriated land—and that much of this was of prime quality and fit for cultivation. The plaintiff avers that the survey is at least ten miles long and seven miles wide, and the defendants well knew of this large quantity of vacant land within their grant, and well knew the excellent quality of much of the land, and purposely devised this scheme to defraud the State out of its public land and revenue.

7th. The information alleges, and the proofs establish, that many years ago a man by the name of John Cox owned a forge for the manufacture of iron at the same place where the defendants have their forge (Elk Creek forge), by virtue of which they made an entry and obtained a grant of 3,000 acres of land (not included in the defendants' boundaries) under the act of 1788, for the use of the said iron works, and that the said grant is still in force.

The defendants, in their answer, insist that Cox's forge at Elk Creek went down many years ago, and was entirely abandoned for any purpose

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of making iron, and that they have not received any of such bounty from him, and are in nowise privy to him in respect to such bounty, and that they have the same right to be encouraged in their enterprise as if they had located their iron works at a different spot from that on which they are established. They deny all combination and fraud.

The cause was set down for hearing on the information, answer, proofs and exhibits, and sent to this Court.

Elaborate surveys were made, by order of this Court, of all the country embraced within the lines of the grant, showing the various tracts heretofore granted, and the amount of vacant land, which were used on the hearing.

Badger, Neal, Crumpler and W. P. Caldwell, for plaintiff.

B. F. Moore, Boyden, Mitchell and Fowle, for defendants.

PEARSON, C. J. It is not necessary, for the purpose of disposing of this case, to decide whether, in reference to grants of this (301) description, all of the requirements of the statute in regard to the manner of making the entry—its return to the County Court—the order for a survey, and the appointment and report of a jury, should be strictly complied with as a condition precedent on which the validity of the grant is made to depend, according to the law as settled in reference to the sale of land for taxes, or whether such matters are only *directory*, so that a grant issued by the proper authorities for land which is the subject of grant, is to be held valid, and can not be declared void and of no effect, notwithstanding the requirements of the statutes have not been observed according to the law as settled in respect to grants issued under the acts in reference to ordinary entries and grants of vacant land.

2. Nor is it necessary to decide whether a grant which includes within its boundaries a large scope of country, say ten miles by seven miles square 45,000 acres, but which, on its face, purports to be a grant of 3,000 acres of vacant land, the excess included in the boundaries being covered by older patents, is in law void, for the want of power in the Governor to issue such grant. We will take occasion to remark, however, without reference to the question of power, that its exercise leaves open a wide door for the admission of fraud, and certainly calls for extreme vigilance on the part of the public authorities.

3. Nor is it necessary to decide whether the defendants were guilty of *actual fraud* in obtaining a grant for some 5,000 acres more than they claimed to be entitled to. It may be, under the circumstances, that owing to the large scope of country covered by the survey, and the infinite number of tracts of land held by older grants, embraced wholly

or in part by the lines of the survey, they did not know, positively, the fact of this large excess, and were intent only on including, at the least, enough vacant land to fill their complement of 3,000 acres, and it is certain the case does not fall under *Attorney-General v. Carver*, 34 N. C., 230; for there everything on the face of the survey and plat was right, and there was no ground to admit of any doubt or question of its correctness, so far as the papers showed, and the (302) fraud was made palpable by the fact, *afterwards disclosed*, that the natural boundaries called for extended the lines *two miles* instead of 200 poles, on the settled rule that course and distance are controlled by a call for natural objects as the boundary. This fact, of itself, convicted both the surveyor and the grantee of a fraud, and there could be no mistake about it. But here, the survey and plat show that a large extent of country was included; the surveyor says 33,000 acres of older patented land is embraced, which, being deducted, leaves 8,000 acres the subject of the grant; so it does not appear, palpably, that the defendants were aware of the large excess of vacant land, and we should require strong proof to lead us to the conclusion that either the County Surveyor, *Calloway*, or his deputy, *McMillan*, knew of the fraud, if any such existed on the part of the defendants, and prostituted themselves in the discharge of the duties of their office, in order to aid the defendants in defrauding the State out of an indefinite number of acres of land not fit for cultivation, and which was subject to entry at five cents per acre; not exceeding, at any estimate, the amount of \$300 as the sum, out of which, in this view of the case, the State has been defrauded by the corruption, not only of the defendants, but of the County Surveyor and his deputy—both sworn officers.

4. For we put our decision on the ground that the grant was issued against law; that is, without the authority of the law, and in a case that did not come within the operation of the statute of 1788, "to encourage the building of iron works." The statute recites, "Whereas, it appears to the General Assembly that *several places* in this State are advantageously situated for the building of iron works," "Be it enacted, that three thousand acres of vacant land, not fit for cultivation, *most convenient to the different seats*, is hereby granted for every set of iron works, *as a bounty* from this State, to any person or persons who will build and carry on the same, to be under the following rules and regulations."

It is alleged in the information, and proved by evidence, that one Cox had, many years ago, built and carried on iron works (303) at this "identical seat," and had, by reason thereof, applied for and obtained a bounty of 3,000 acres of vacant land. The question is:

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Was this bounty land of 3,000 acres appendant to the *seat of the iron works*, or was the intention to give a bounty of 3,000 acres of land to every person who would, upon that seat, from time to time, build and carry on iron works? Upon the former construction, when the iron works should be built and carried on at the particular seat, the bounty of three thousand acres of land most convenient to the seat was to be given, and although the bounty land was not annexed to *the seat*, so that the seat could not be conveyed without passing the bounty land, or the bounty land could not be conveyed, wholly or in parcels, without also conveying the seat of the iron works, still the bounty was exhausted, and could not be claimed in behalf of any other person who should purchase or otherwise acquire the ownership of the seat after the bounty land had been severed from it. Upon the latter construction, every person who, by purchase, descent or otherwise, might at any time, acquire title to the seat, would be entitled to a bounty of three thousand acres of land, so that all that was necessary to do, in order to acquire a title to another bounty of three thousand acres of land was for the man who had obtained the bounty to let the works go down and sell off the three thousand acres of land which had been received as a bounty, and then rebuild and carry on the works long enough to make five thousand pounds of iron, and thereupon entitle himself to another bounty of three thousand acres of vacant land, not fit for cultivation, "most convenient to the seat;" then let him sell to a stranger the seat for the iron works after he has ceased carrying on the works, and let the purchaser of the seat rebuild and make five thousand pounds of iron, and he gets another bounty of three thousand acres of land, *most convenient to the seat*, and so *ad infinitum*, until all of the vacant land in the county is absorbed by these successive bounty grants!

This latter construction can not be adopted, and we hold, according to the true construction of the statute, the grant of the (304) bounty of three thousand acres of land to Cox, in respect and as appendant to this particular seat on which he had built and carried on iron work, exhausted the bounty intended to be given by the statute, and no one who afterwards became the owner of the seat had any right to claim another bounty of another three thousand acres of land. It follows that the grant in question was issued against law, and is, therefore, void.

PER CURIAM.

Decree accordingly.

CHAMBERS v. REID.

JOHN CHAMBERS and others against WILLIAM REID and others.

Where a bequest was made, to the children of a brother and sister of the testator, to which is added, "that is, on the supposition, that my brother is dead; but if he is alive at the time of my death, then he is to receive one-half of my estate," it was *Held*, that no question as to whether the estate was to be divided, according to *heads* or *stocks* could arise, for that the brother took one-half of the estate, and his children nothing.

CAUSE removed from the Court of Equity of MECKLENBURG.

David Chambers died in the year 1858, having made and published his last will and testament, in which, after several dispositions of his property in various clauses, he bequeaths as follows: "Item 7th, It is my will that, after all the foregoing items of my will are fully carried out, that the balance of my estate be disposed of as follows: To be equally divided between the children of my brother, John Chambers, and the children of my deceased sister, Nancy Woodward, each to share equally in all respects; that is, on the supposition that my brother be dead, but if he is alive at the time of my death, then he is to receive one-half of my estate himself."

It turned out that at the testator's death his brother John Chambers was living, but in a distant State, and had not been heard from by his brother for many years. He, John, had at the death of the (305) testator nine children who are all parties plaintiff, and they claim to share equally, each with the children of Mrs. Woodward, after deducting one-half of the estate for their father, John Chambers.

The children of Mrs. Woodward, of whom there are five, and the executor of the will, are made parties defendant, and insist that these children are entitled to have one-half of this residuary interest divided among them, conceding that John Chambers is entitled to the other half. The cause was set down for hearing on bill, answer and exhibits, and sent to this Court.

Fowle, for plaintiff.

Wilson and *Boyden*, for defendant.

BATTLE, J. We have no hesitation in saying that the construction of the will in question, contended for by the defendants is correct. Had the latter part of the clause, which relates to the supposition of the death of the testator's brother John, been omitted, then his nine children would have taken equally *per capita* with the five children of the testator's deceased sister, according to the well known rule applicable to such bequeaths. See *Bryant v. Scott*, 21 N. C., 155; *Harrell v. Davenport*, 58 N. C., 4; *Roper v. Roper*, *Ibid.*, 16. But the reference by the testa-

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tor to his brother John, and saying that if he were alive he should receive one-half of the estate himself, is, we think, a sufficient indication of intention that the divisions should be *per stirpes*, so that if John had been dead, his children would have taken only one-half of the estate, to be equally divided between them, leaving the other half to be equally divided between the children of the deceased sister. See *Bivens v. Phifer*, and the cases therein referred to, 47 N. C., 436. However that may be, we are satisfied that as John was alive, he took all that was intended for him or his family, which excludes his children, and leaves one-half of the legacy for the children of the testator's deceased sister, Mary Woodward. A decree may be drawn in accordance with this opinion.

PER CURIAM.

Decree accordingly.

In the Matter of YATES.

Where a court of equity is resorted to, for the sale of land, after the sale is ordered to be confirmed (by which the bid becomes *accepted*), if the master informs the court that the bidder refuses to comply with the terms of the sale, no order prejudicing the rights of the bidder can be made until he is made a party to the proceedings by the service of a rule upon him to show cause.

THIS is an appeal from an interlocutory order made by *Osborne, J.*, at Fall Term, 1861, of the Court of Equity of MARTIN.

The Supreme Court having reversed the order directing the land in question to be resold, and that Coffield and Barnhill pay the difference between the first and a second sale, the cause came on for further consideration of the Court, and the following order was made: "Upon reading the report of the Master, it appearing thereby that the tract of land described in the petition as adjoining the land of C. Moore and others, bounded by the Roanoke River on the north, C. Moore and others on the south, Simmons, Grady & Co., on the west, had been sold by the said Master and bid off by one Archibald H. Coffield for himself and Turner E. Barnhill, as the last and highest bidder, at the price of \$6,000, and the said Archibald H. Coffield had been accepted by the Master as the purchaser thereof at the said sum, which sum, by the terms of the sale, was to be paid in sums as follows: \$3,000 on 1 January, 1862, (307) with interest from 1 January, 1861, and \$3,000 on 1 January, 1863, with interest from 1 January, 1861, and each sum was to be secured by the bond of the purchaser, with good security. Whereupon, also, the decretal order for the sale of the premises being read, and now the matter being again moved by the counsel for the

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petitioner, Coffield and Barnhill apposed the motion, and they offered to file affidavits establishing the fact that before the sale no information was given to them, or either of them, as to the true state of the title of the petitioner to the land aforesaid; and they also opposed the motion, on the ground that the purchasers had no actual notice of this motion; the Court doth confirm the sale to the said Archibald H. Coffield, and thereupon, on the prayer of the counsel for the petitioner, the Court doth order that notice of this proceeding be served on Coffield and Barnhill by the Sheriff of this county, requiring them to appear at the next term of this Court, and complete their purchase as aforesaid according to the terms of the said sale, or then show cause to the contrary. And in the event that they do not, or that said Coffield does not complete the said purchase, or show to the Court cause to the contrary, the said master forthwith re-sell the said premises, and that all the costs, charges and incidental expenses attending the said sale and occasioned by the default of the said Coffield and Barnhill, together with any loss or deficiency in the price and interest arising by a second sale, be ascertained by the master, and the same be paid into the office of this Court by the said Coffield and Barnhill for the benefit of the petitioners."

From this order Coffield and Barnhill prayed an appeal to the Supreme Court, which was allowed.

B. F. Moore for the petitioners.

Winston, Jr., for Coffield and Barnhill.

PEARSON, C. J. When the case was here before (ante 212) we pointed out the "orderly mode of proceeding," where the agency of a Court of Equity is resorted to in order to sell land.

On the coming in of the master's report, if the Court is satisfied that the interest of the petitioner, for whom the Court is acting, has been attended to, the first order is to confirm the sale. The (308) effect of which is to *accept* the bid of the purchaser, which is necessary, in order to "bind the bargain," so far as the petitioner is concerned. The purchaser is not a party to this order. He is not, then, before the Court, and of course his rights are not in any way prejudiced by the order of confirmation.

Whereupon, the Court being informed by the Master that the purchaser declines to comply with the terms of the sale, a rule is taken on him to show cause; which may be returned instanter if the purchaser is present. The object of the rule is to bring the purchaser before the Court, and upon its return *both* parties are then heard, and the Court adopts one of the three orders set out in our former opinion.

 ALLEN v. PEARCE.

His Honor erred in making any further order until the return of the rule; and indeed, the order which is made assumes that the purchaser will not be able to show any good cause, and proceeds to direct what shall be done in that event.

We presume his Honor was misled by the orders made in *Harding v. Yarbrough*, ante 215, which the reporter appends as a note to this case on former hearing. In that case, the purchaser made no difficulty, because of a defect in the title, or any irregularity in the mode of conducting the sale, or otherwise. The sole difficulty grew out of an inability to give the security. So in *Harding v. Harding*, 18 Eng. Ch. 514, from which the order in *Harding v. Yarbrough* was taken, there had been a reference, as to the title (which is always done in England, on account of the very complicated condition of title in that country), and the only object was to compel the purchaser to comply with the terms of sale. In our case the purchaser had a right to be heard in reference to his objections to the manner of making the sale, or to the title, or any other ground of objection, and the object of the rule was to give him a day in Court, and an opportunity of being heard. So the entry in *Harding v. Yarbrough* had no application.

This opinion will be certified that further proceedings may be taken in the Court below; the orders in that Court being reversed, except so much as confirms the sale, and directs a rule on the purchaser to show cause at the next term.

PER CURIAM.

Reversed.

Cited: Edney v. Edney, 80 N. C., 84; *Capel v. Peebles, Id.*, 93; *Farmer v. Daniel*, 82 N. C., 157; *Burgin v. Burgin, Id.*, 199; *White, Ex parte, Id.*, 380; *Harrell v. Blythe*, 140 N. C., 416.

JAMES P. ALLEN against JOHN PEARCE and others.

1. Where the obligee, in a bond for title, paid a material portion of the purchase money down, and gave a note for the residue, and entered into possession and continued it up to the time of a suit in ejectment by the obligor, it was *Held*, to be a strong case for the court of equity to interfere by injunction, to prevent the obligee from being turned out, under the execution, in the suit at law.
2. Where, to a bill for an injunction, the defendant answers lightly and evasively to material allegations, the injunction will not be dissolved.
3. Where a new matter is introduced in an answer, in avoidance of the plaintiff's equity, it will not be considered on a motion to dissolve.

Appeal from the interlocutory order of the Court of Equity of WAKE, ordering the dissolution of an injunction, BAILEY, J.

ALLEN v. PEARCE.

The defendant, John Pearce, on 15 June, 1857, entered into a penal bond payable to the plaintiff, James P. Allen, which was conditioned that "if the said J. P. Allen shall fully comply with the contract in the above premises, and pay to the said John Pearce the remainder of the purchase-money, with interest and necessary costs of these transactions, which is \$175.10, seventy dollars of which is this day paid in cash and the receipt whereof is hereby acknowledged, and the remainder is \$107.10, with interest from the 7th, then the said John Pearce is to make him a good and lawful title to the above lands." The plaintiff immediately went into possession of the premises, and has occupied them ever since.

Before this suit was brought, Pearce falling into pecuniary difficulties, conveyed the land in question to one Geo. W. Thompson, as trustee for the payment of his debts, and on 29 September, (310) 1861, he sold the same at public auction to the defendant, Marcellus Pearce, and made him a deed in fee simple for the same. The plaintiff alleges that he attended at this sale by the trustee and made objection thereto. Also that the defendant, Marcellus, had full knowledge of the equitable claim of the plaintiff, and so had the said G. W. Thompson, when the deed of trust was made to him.

The plaintiff alleges that before this sale, and before this suit was brought, but after the money fell due, he tendered the purchase-money in full, and demanded a deed in fee simple from the said Pearce and the other defendants claiming under him, which was refused.

The plaintiff further shows that the defendant, Marcellus Pearce, sued him in ejectment and obtained a judgment by default, and is threatening to turn him out of the possession. The prayer is for an injunction (which issued) and for an account for the ascertainment of the balance of the purchase-money, and for a conveyance to him of the legal title on the payment thereof also for general relief.

The defendants admit the bond to make title to plaintiff; they also admit that the payments, alleged, have been made; the defendant, Pearce, admits also the tender, but denies that it was in full or that it was made before the execution of the deed of trust. The manner of this denial is noticed in the opinion of this Court. The defendant, Marcellus Pearce, denies that the plaintiff forbade the sale by the trustee, but alleges that he assented to the sale and urged the running off of the land.

On the coming in of the answer, the defendants' counsel moved for a dissolution of the injunction, which, on argument, his Honor granted, and it was ordered to be dissolved; from which order the plaintiff, by leave of the Court, appealed.

Fowle, for the plaintiff.

A. M. Lewis, for the defendants.

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BATTLE, J. The right of the plaintiff to call upon the defendant, John Pearce, for a specific execution of his contract, for the sale (311) of the land in controversy, is clear beyond all question. The contract for the sale is in writing, a part of the purchase-money was paid in cash, and a note given for the residue, and the plaintiff thereupon took, and still continues in, possession. The plaintiff alleges that before the execution of the deed, in trust, by the said John Pearce to the defendant, Thompson, he tendered to Pearce the balance of the purchase-money, and demanded a conveyance, which was refused. And this defendant admitting the written contract of sale, and admitting also the tender, denies that it was in full, or was made before the execution of the deed in trust. The denial, however, is made so slightly and evasively as to have very little weight. It is true, that the tender was made after the note became due, but it is idle to say, as the defendant, John Pearce, does, that the contract was abandoned, and the plaintiff's equity relinquished. There cannot be the slightest pretense that this case is an exception to the maxim that in equity "time is not of the essence of the contract." See *Falls v. Carpenter*, 21 N. C., 237, and the note to Battle's edition.

The defendant, John Pearce, had then no right, upon his answer, to move for a dissolution of the injunction, and the other defendants have no greater rights than he has, as they do not deny that they purchased with notice of the plaintiff's claim.

The allegation, faintly made by the defendant, Marcellus Pearce, that the plaintiff assented to the sale by the defendant, Thompson, as trustee, is an averment of new matter which may possibly avail him, if he can prove it on the hearing, but it cannot be considered, on this notice to dissolve the injunction, it being an established rule that the injunction must be continued, unless the equity, set forth in the plaintiff's bill, be denied in his answer; *Lindsay v. Etheridge*, 21 N. C., 36. The order dissolving the injunction must be reversed.

PER CURIAM.

Decree accordingly.

(312)

S. D. BEVIS, Executor, against AUGUSTIN LANDIS.

A sheriff has a right to sell any property of the debtor that is subject to the lien of his execution, and the fact that one has bought part of such property at private sale, *bona fide*, and paid the full value, and that enough of other property remained to satisfy the execution, and that the sheriff and purchaser had knowledge of this purchase, but were benefited in the sale of this particular property, and made it from such motive, could raise no equity against the sheriff or purchaser.

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CAUSE removed from the Court of Equity of GRANVILLE.

The slave in question, a man named Anderson, was sold by the sheriff, Joseph H. Gooch, at public auction to the defendant, Landis, by virtue of an execution against one D. A. Paschall. The intestate of the plaintiff had purchased Anderson at private sale on 12 September, 1857, and took a bill of sale for him from Paschall. The consideration expressed in this bill of sale is \$1,000. The sheriff's sale took place after the date of the bill of sale, but under an execution having a lien prior to the date thereof. At the sale the agent of the plaintiff's testator attended and exhibited his title and forbade the sale, pointing out to the sheriff divers other slaves and other property in the hands of Paschall out of which the execution could be satisfied; the sheriff, nevertheless, proceeded to cry the sale, and the defendant, Landis, having become the last and highest bidder, the slave was cried off to him and delivered to him by the sheriff with his bill of sale.

The bill charges that both the sheriff and Landis, the purchaser, knew of Morris' purchase, but were involved on account of Paschall, and the sale of this slave, Anderson, was made to relieve them as to these liabilities. The bill was filed by Morris in his lifetime, and his death being suggested, his executor, the present plaintiff, was made a party. The prayer is that Landis shall convey the legal title of Anderson to the plaintiff (then Morris) and deliver possession, and account for the slaves's services and profits since he purchased him, and in default thereof that Gooch may account, etc. The answer of the defendant alleges various matters in the way of explanation, which are not deemed necessary to be set forth—it states, however, that executions of (313) a test junior to this sale to Morris came into the hands of the sheriff, and without selling Anderson under the former lien there was not enough property to satisfy them all.

The cause was set for hearing on the bill, answer, proofs and exhibits, and sent to this Court.

B. F. Moore, for the plaintiff.

No counsel appeared for the defendant in this Court.

PEARSON, C. J. The bill is filed on the assumption that one who purchases, at a fair price, a slave or other articles of a debtor, whose property is subject to the lien of an execution, but who has other slaves and property besides the one sold sufficient to satisfy the execution, is entitled to the protection of a Court of Equity, so that provided he gives notice to the sheriff of the fact of his being a purchaser of one of the slaves, and forbids the sheriff from selling that particular slave, and requires him to make the amount of the execution by selling some

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one of the other slaves, and the sheriff, nevertheless, proceeds to sell the particular slave, equity will, in favor of the purchaser at private sale, convert the purchaser at the execution sale into a trustee, if he is fixed with notice of the facts, and require him to convey the slave to the purchaser a private sale.

The bill is of "the first impression." No case or dictum was cited to support it, and we are not able to see any principle upon which such an equity can be based.

It is true the title of a debtor is not divested by the execution. If he sells, the purchaser acquires the property subject to the lien of the execution. If that be removed his title is good, but if it be not removed, his title will be divested by a sale under it, and neither a Court of law or equity can control the power of the sheriff to make sale under the execution. Indeed, such an interference would give rise to much inconvenience, and greatly embarrass officers in the discharge of their duties. One man will say, "I have bought this negro and forbid (314) you from selling him, because the other property is sufficient out of which you can make your money." A second says, "I have bought *this* negro and you must not sell him." So a third and a fourth; and the sheriff may properly reply, "the law has not made it my duty to take care of your rights, or to settle priorities between you; I have power to sell any one or all of these negroes in order to satisfy the execution; it was your folly to buy property subject to my lien, without taking care to provide for the payment of the executions." This position of the sheriff is unanswerable. The courts could not interfere with the action of the sheriff under this general power given by the execution, even in behalf of a surety whose property was sold, or was about to be sold, to pay the debt in the first instance, although it was known to the sheriff that the principal had property out of which the debt could be made; see *Eason v. Petway*, 21 N. C., 44. It was necessary to pass an express statute for the protection of the surety against the capricious and wanton exercise of this power by sheriffs and other officers; Rev. Code, ch. 31, sec. 124. It has not been deemed expedient by the Legislature to pass a statute for the protection of those who choose to buy property subject to the lien of an execution, and who fail to provide for its satisfaction.

The only case cited on the argument was *Smith v. McLeod*, 38 N. C., 390, and the counsel of the plaintiff contended there was a direct analogy between the relation of a surety and that of a purchaser at a private sale, from a debtor, of property subject to the lien of an execution. We are not able to perceive the supposed analogy. In the case cited the Court agree there is no ground on which to control the action of the sheriff and relieve the surety, on the ground of a privity between him and

the creditor, by reason of which the creditor is bound to let the surety have the benefit of any security or lien, which he has acquired as against the principal, and decide that the active interference of the creditor in withdrawing from the hands of the sheriff an execution, under which a lien had attached to the property of the principal, was (315) a discharge of the liability of the surety by matter *in pais*. But where is the analogy? There is no privity of relation between the creditor in the execution and one who chooses to purchase a part of the property which is subject to the lien of his execution. On the contrary, such a purchaser at private sale is a stranger, and, in fact, an intermeddling stranger, who had no business to buy any part of the debtor's property, without taking care to see that the prior lien was satisfied.

If the purchaser at private sale is not entitled to relief against the sheriff, or a purchaser under the execution sale, when the sale of the particular slave is made capriciously or wantonly by the sheriff, when the debtor has other property liable to execution, the case is much stronger against him when the sheriff having received other executions junior to the private sale thinks it to be his duty to sell the particular negro, under the older execution, in order so to conduct the business as to satisfy as many of the executions in his hands as the property of the debtor can be made to reach. For the sheriff acts as the agent of all the creditors who have executions put into his hands, and his conduct then is not capricious or wanton, but in pursuance of a duty to the creditors imposed on him by having the executions in his hands.

Nor is the case altered by the fact that the sheriff and the purchaser at execution sale had an interest on account of their liability, as the surety or otherwise, of the debtor in the execution. The sheriff had the power, under the older execution, to sell this particular negro. It was his duty so to make the sales as to cause the property of the debtor to go as far as possible towards discharging all the executions in his hands, and neither his power or duty could be affected by the fact that he had a collateral interest which was subserved by the exercise of a power in the performance of his duty, and this can furnish no ground on which a stranger who chose to interfere can base any rights to have relief in equity.

The view we have taken of the case makes it unnecessary to decide whether the plaintiff was a *bona fide purchaser* or one who had taken a bill of sale, absolute on its face, which was intended as a (316) mere security, that fact not being expressed on the face of the bill of sale, in order to avoid the necessity of giving notoriety to it by registration, so as to enable the debtor to conceal for a time the fact of his insolvency.

PER CURIAM.

Bill dismissed.

LLOYD v. WHITLEY.

HENRY S. LLOYD against JOHN B. WHITLEY.

Where A sued B, on a contract about the getting of shingles, and a compromise was made in writing, to the effect that B should confess judgment for \$500, to be discharged within twelve months by the delivery of so many shingles at given prices, and a judgment was entered accordingly, it being admitted that the shingles were to be paid for when delivered, at the prices agreed on, it was *Held*, that the writing and the judgment were but an obligation to pay a penal sum, and the court directed that the judgment should stand as a security for the damages actually sustained.

CAUSE removed from the Court of Equity of MARTIN.

The plaintiff and defendant having had a controversy at law about the getting of shingles, the following covenant was entered into between them, viz.:

"STATE OF NORTH CAROLINA—Edgecombe County.

"Whereas, there is a suit pending in the Superior Court of law of said county, wherein Henry S. Lloyd is plaintiff, and John B. Whitley and Newsom Allsbrook are defendants, and the said parties are anxious to compromise the said suit; now these articles witness, that the said Whitley, for and in consideration of the obligation hereinafter undertaken by the said Lloyd, will at the next term of the Superior Court of law of said county, to be held on the 2d Monday of this month, suffer the said Lloyd to enter a judgment against the said Whitley for the sum of \$500 and the costs of the suit, and will, within twelve months from the (317) date of these presents, obtain and manufacture upon the lands of the said Lloyd, situated in the county of Martin, 250,000 cypress shingles (two-feet and thirty-inch shingles), at the price of three dollars per thousand for the thirty-inch shingles, and two dollars per thousand for the twenty-four inch shingles.

"And the said Lloyd, in consideration of the above obligations, does bind himself not to sue out execution upon the said judgment within the term of twelve months, and that when the said Whitley shall obtain and manufacture the shingles which he has contracted to do, the said judgment shall be considered as satisfied, and an entry to that effect shall be made upon the records of the said court." Signed and sealed by the parties, 8 March, 1856. Allsbrook having become insolvent was left out.

In pursuance of this covenant and compromise, Whitley on the 2d Monday in March, 1856, in the Superior Court of Edgecombe, allowed the following entry to be made, viz.: Judgment confessed by the defendant, J. B. Whitley, for \$500 and costs of suit. Execution in this case to be stayed for twelve months, and it is agreed between the parties that the judgment is to be discharged upon the performance of the condition set forth in the written agreement between them.

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The plaintiff alleges that he faithfully endeavored to make the shingles he agreed to make, but on account of the high water in the swamp pointed out to him by Lloyd and his obstinate refusal to let him work in drier swamps which he (Lloyd) owned in Martin County, he (Whitley) only procured about 40,620 thirty-inch shingles and 13,070 two-foot shingles, which were accepted by one Ray, the agent of defendant Lloyd. The defendant took out execution on this judgment returnable to March term, 1857, but directed the sheriff not to make the money. After that term he took out an alias execution, and gave orders for its enforcement. The bill is for an injunction, insisting that the said judgment is only a penalty, and that no execution can issue upon it. He states as a reason for not having applied for an injunction in proper time, that the defendant assured him that he did not intend to collect the money (318) within two years, and that he meant to give him every opportunity to make the shingles in pursuance of the condition. The plaintiff alleges that besides the price of the shingles, he did twenty days work with one hand, in boating shingles, for which he received no pay. The plaintiff also prays that the defendant shall pay him for the shingles he obtained and delivered to the defendant, and for payment for boating; asks for an account for the purpose of ascertaining what is due to him and also what damages are due the defendant for his failure to perform the contract, which he is willing to pay, and for general relief.

The defendant in his answer insists that this entry of \$500 is not a penalty, but was agreed upon and entered as liquidated damages in case the contract should not be performed by Whitley. He denies that he made any promise or otherwise deluded the plaintiff as to the issuing of the execution, but he admits that he is bound to pay the prices agreed upon for the shingles delivered, and as to that, he says that the plaintiff is largely indebted to him on other accounts, and proposes to set off the amount thus due with such, his counter claims.

The bill was filed at Spring Term, 1858. Was continued at Fall Term, 1858. Was set for hearing on bill and answer at Spring Term, 1859, and by consent was sent to this Court. Motion below to dissolve the injunction. The transcript says, "sent by consent to the Supreme Court."

Winston, Jr., for the plaintiff.

B. F. Moore, for the defendant.

PEARSON, C. J. The jurisdiction of the Court of Equity to prevent the enforcement of penalties on payment of the damages sustained by reason of a breach of the condition was so obviously necessary to the ends of justice, that in most cases relief is now given at law by statutes,

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which require the plaintiff to suggest breaches, and provides for (319) the ascertainment of the damages, whereupon judgment is to be entered for the penalty, but the execution which may issue thereon is to be satisfied by the payment of the damages assessed, together with the costs.

The plaintiff insists that by a proper construction of the judgment and the covenant referred to, the sum of \$500 is a penalty to be discharged upon the performance of the condition set forth in the covenant, to wit, that the plaintiff shall in twelve months make for the defendant 250,000 shingles (two-feet and thirty-inch shingles) at the price of \$2 per thousand for the two-feet, \$3 per thousand for the thirty-inch shingles, alleges a part performance of the condition, and submits to pay the damages sustained by the defendant by reason of his failure in respect to the number of the shingles which he has failed to make, and prays that the defendant may be enjoined from enforcing the collection of the \$500.

The defendant insists that the \$500 is not a penalty, but liquidated damages, and claims the right (the plaintiff having failed to discharge the judgment in the manner by which he was allowed to do it under the covenant) to enforce its collection, subject to a credit for the shingles got by the plaintiff, which the defendant admits he is bound to pay for at the agreed prices, and on his part claims a deduction for certain credits.

The question is one of construction, and it seems to us, a very plain one. The judgment, on its face, is to be discharged upon the *performance of the condition* set forth in the written agreement between them. That is, the judgment is to be void, provided the plaintiff makes for the defendant 250,000 shingles at the prices agreed on. So it is neither more nor less than a penalty by which to enforce the performance of an agreement on the part of the plaintiff to make for the defendant a certain number of shingles at certain prices for the several descriptions. Had the \$500, for which the judgment is entered, been liquidated damages, that is, an amount which it was agreed the plaintiff *owed* the defendant, but which he was willing to allow the plaintiff to pay in shingles, it would have been set out in the covenant and judgment (320) that the \$500 was to be paid in shingles to be got on the defendant's land, for which the plaintiff was to be allowed certain prices per thousand. This is not the language used, and it is perfectly certain that the shingles were to be *paid for* by the defendant, and were not to be *accepted* by him in payment of the judgment. Indeed, the defendant admits by his answer that he "is bound to pay the plaintiff for the shingles got at the agreed prices." The fact of his being bound to pay for the shingles got is wholly inconsistent with the suggestion that the plaintiff was indebted to him to the amount of \$500; for if so, of course

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the shingles ought to be applied in payment of the debt, whereas, from the face of the judgment and of the covenant, and by the admission of the defendant, he was to pay for the shingles, and they were not to go in payment of the judgment; in other words, the judgment was to be held *in terrorem*, in order to force the plaintiff to make for the defendant 250,000 shingles, for which, when made, the defendant was to pay the plaintiff the prices agreed on.

The mode of argument *reductio ad absurdum*, will demonstrate, by figures, that the \$500 was not a debt to be paid by 250,000 shingles, of the two descriptions, at the prices fixed on:

250,000 at \$2 per thousand, is	\$500
250,000 at \$3 per thousand, is	750
125,000 at \$2 per thousand, is	\$250
125,000 at \$3 per thousand, is	375— 625
166,000 at \$3 per thousand, is	500

So the matter can not be worked out by figures, unless all the shingles are of one description, that is, two feet, leaving no room for a single thirty-inch shingle.

We are satisfied that the \$500 was a penalty, and the judgment was taken as a security for the making of an agreed number of shingles at the prices agreed on for the several descriptions.

The plaintiff having failed to perform the conditions, became liable, at law, for the penalty, but is entitled in equity to be relieved of the penalty by making satisfaction for the damages which the (321) defendant has sustained by reason of the breach of the condition.

There will be a decree accordingly, and a reference to ascertain the amount of damages, allowing the plaintiff for the number of shingles got, and for his labor in "boating the shingles," if that allegation is proved, and allowing the defendant for the payments alleged to have been made to the hands of the plaintiff for the work done by them upon, and in respect to the shingles, but no item of charge or discharge which did not grow out of and concern the making of the shingles will be taken into the account.

The motion to dissolve the injunction on the ground that it was improvidently granted, not having been appealed from within the time prescribed by the statute, is not allowed, for the case is now before us on the final hearing, being set for hearing on the "bill and answer" in the Court below, and removed to this Court for hearing. No disposition having been made of the motion to dissolve the injunction, the reasoning of the Court in *Smith v. McLeod*, 38 N. C., 400, applies with full force; for, although that case had reference to the provisions of the Revised Statutes, and this depends upon the Rev. Code, yet, here is the

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fact, we decree for the plaintiff "on the equity, confessed by the answer," and make the injunction perpetual, except as to the damages. So, of course, the motion to dissolve on the ground that the injunction was improvidently granted in the first instance is out of time.

This view makes it unnecessary to express an opinion on the point as to whether the fiat, made by the Judge below on the averments of the bill, was not a matter of discretion, and, of course, not the subject of review.

PER CURIAM.

Reference ordered.

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There are circumstances under which the striking of his wife with a horse-whip, or switch, by a husband, and inflicting bruises, would not be the ground of a divorce. Where, therefore, such violence was made the ground of an application for a divorce, it was *Held*, to be necessary that the bill, or petition, should set forth *particularly and specially* what she did and said immediately prior to and during such use of force.

THIS is an appeal from an interlocutory order of *Osborne, J.*, in the Court of Equity of NORTHAMPTON, allowing to the petitioner for a divorce alimony *pendente lite*.

The petitioner states that she was the widow of one David Futrell, and intermarried with the defendant in November, 1860; that she had a reasonable prospect of happiness from the marriage, herself well bred and of a respectable family, and her husband not less than a fair match for her; that in this she was greatly disappointed; that her husband manifested great coarseness and brutality, "and even inflicted the most severe corporal punishment. This he did on two different occasions, once with a horse-whip and once with a switch, leaving several bruises on her person." "He used towards her abusive and insulting language, accused her of carrying away articles of property from his premises to her daughter by a former husband; refused to let said child live with her; has frequently at night, after she had retired, driven her from bed, saying that it was not hers, and that she should not sleep upon it. He has also forbade her sitting down to his table in company with his family," and that "by such like acts of violence and indignity has forced her to leave his house, and that she is now residing with her friends and relatives, having no means of support for herself and an infant son born within the four past weeks." These facts, the ground of this her complaint, have existed at least six months prior to the filing of this bill. "Your petitioner, during the whole time of her intermarriage with

the defendant, saith that she has been a dutiful, faithful and affectionate wife, and desired so to continue during life, but the outrages upon her person and rights have made it her desire, as well as duty to seek a perpetual separation from his bed, his board, and from the bonds (323) of matrimony." The bill prays accordingly and for alimony.

At the term to which the process was returnable the plaintiff's counsel moved for alimony *pendente lite*, when the following order was made: "This cause coming on to be heard, it is ordered upon hearing of the cause and upon affidavits as to the estate of the defendant, that the clerk and master give notice to the defendant to pay into the office of the clerk and master for Northampton County the sum of \$350, as alimony, for the subsistence of the said plaintiff and her child until the next term of the Court, and that the payment of the above sum be made on or before 15 December, 1861."

From this order the defendant prayed an appeal to the Supreme Court, which was granted.

Barnes, for the plaintiff.

W. N. H. Smith, for the defendant.

PEARSON, C. J. The Legislature has deemed it expedient to enlarge the grounds upon which divorces may be obtained; but as a check or restraint on applications for divorces, and to guard against abuses, it is provided that the cause or ground on which the divorce is asked for shall be set forth in the petition "particularly and specially." It is settled by the decisions of this Court that this provision of the statute must be strictly observed, and the cause or causes for which the divorce is prayed must be set forth so "particularly and especially" as to enable the Court to see on the face of the petition that if the facts alleged are true the divorce ought to be granted: *Everton, v. Everton*, 50 N. C., 202. The correctness of this construction is demonstrated by the fact that upon appeals from an order allowing alimony pending the suit, like the present, this Court is confined expressly to an examination of the cause or causes of divorce, as set out on the face of the petition, and can look at nothing else in making up the decision; Rev. Code, ch. 40, sec. 15.

By the rules of pleading in actions at the common law every allegation of fact must be accompanied by an allegation of "time (324) and place." This rule was adopted in order to insure proper certainty in pleading, but a variance in the *allegata* and *probata*, that is, a failure to prove the precise time and place as alleged in the pleading, was held not to be fatal, unless time or place entered into the essence and made a material part of the fact relied on in the pleading.

There is nothing on the face of this petition to show us that time

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was material, or a part of the essence of the alleged cause of divorce; that is, that the blows were inflicted at a time when the wife was in a state of pregnancy, with an intent to cause a miscarriage, and put her life in danger, and there is nothing to show us that the place was a part of the essence of the cause of divorce, that is, that the blows were inflicted in a *public* place, with an intent to disgrace her and make her life insupportable, so we are inclined to the opinion that it was not absolutely necessary to state the time and place, or if stated, that a variance in the proof, in respect to time and place, would not be held fatal.

But we are of opinion that it was necessary to state the circumstances under which the blow with the horse-whip and the blows with the switch were given; for instance, what was the conduct of the petitioner; what had she done or said to induce such violence on the part of the husband? We are informed by the petitioner that she was a woman "well-bred and of respectable family, and that her husband was not less than a fair match for her." There is no allegation that he was drunk, nor was there any imputation of unfaithfulness on either side (which is the most common ingredient of applications for divorce), so there was an obvious necessity for some explanation, and the cause of divorce could not be set forth "particularly and specially," without stating the circumstances which gave rise to the alleged grievances.

It is said on the argument that the fact that a husband, on one occasion, "struck his wife with a horse-whip, and on another occasion with a switch, leaving several bruises on her person," is, *of itself*, a (325) sufficient cause of divorce, and consequently the circumstances which attended the infliction of these injuries are immaterial, and need not be set forth. This presents the question in the case:

The wife must be subject to the husband. Every man must govern his household, and if by reason of an unruly temper, or an unbridled tongue, the wife persistently treats her husband with disrespect, and he submits to it, he not only loses all sense of self-respect, but loses the respect of the other members of his family, without which he cannot expect to govern them, and forfeits the respect of his neighbors. Such have been the incidents of the marriage relation from the beginning of the human race. Unto the woman it is said, "Thy desire shall be to thy husband, and he shall rule over thee," Genesis, ch. 3, v. 16. It follows that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place. Why is it that by the principles of the common law if a wife slanders or assaults and beats a neighbor the husband is made to pay for it? Or if the wife commits a criminal offense, less than felony, in the presence of her husband, she is not held responsible? Why is it that the wife cannot

make a will disposing of her land? and cannot sell her land without a privy examination, "separate and apart from her husband," in order to see that she did so voluntarily, and without compulsion on the part of her husband? It is for the reason that the law gives this power to the husband over the person of the wife, and has adopted proper safeguards to prevent an abuse of it.

We will not pursue the discussion further. It is not an agreeable subject, and we are not inclined, unnecessarily, to draw upon ourselves the charge of a want of proper respect for the weaker sex. It is sufficient for our purpose to state that there may be circumstances which will mitigate, excuse and so far justify the husband in striking the wife "with a horse-whip on one occasion and with a switch on another, leaving several bruises on the person," so as not to give her a right to abandon him and claim to be divorced. For instance, suppose a husband comes home and his wife abuses him in the strongest (326) terms—calls him a scoundrel, and repeatedly expresses a wish, that he was dead and in torment! and being thus provoked in the *furor brevis*, he strikes her with the horse-whip, which he happens to have in his hands, but is afterwards willing to apologize, and expresses regret for having struck her: or suppose a man and his wife get into a discussion and have a difference of opinion as to a matter of fact, she becomes furious and gives way to her temper, so far as to tell him he *lies*, and upon being admonished not to repeat the word, nevertheless does so, and the husband taking up a switch, tells her if she repeat it again he will strike her, and after this notice she again repeats the insulting words, and he thereupon strikes her several blows; these are cases in which, in our opinion, the circumstances attending the act, and giving rise to it, so far justify the conduct of the husband as to take from the wife any ground of divorce for that cause, and authorize the Court to dismiss her petition with the admonition, "if you will amend your manners, you may expect better treatment"; see Shelford on Divorce. So that there are circumstances under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground for a divorce. It follows that when such acts are alleged as the causes for a divorce, it is necessary in order to comply with the provisions of the statute, to state the circumstances attending the acts and which gave rise to them.

It was suggested that the averment at the conclusion of the petition, which is made after the averment, "that the facts which are made the ground of this complaint have existed at least six months prior to the filing of this bill"; "your petitioner during the whole time of her inter-marriage with defendant, saith that she has been a dutiful, faithful

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and affectionate wife, and desired so to continue during life, but the outrages upon her person and rights have made it her desire (327) as well as duty to seek a perpetual separation from him," is sufficient to apply the defect in not setting out "particularly and specifically" the circumstances under which the blows were inflicted on her person.

We do not think a general averment of this kind, unconnected as it is with the allegations of fact, can be allowed to have the effect of the *particular and special* statement, which the statute requires. It is not traversable, and we cannot say, as a conclusion of law, what may, in her opinion, be such conduct as is consistent with the character of a dutiful, faithful and affectionate wife. It is unnecessary to notice the other matters of complaint set out in the petition, because they are admitted not to be, of themselves, sufficient, and are put in as *makeweights* or *props* of the main causes, which we have fully adverted to.

Nor is it necessary to notice the objections, because of the fact that the bill had not been exhibited to a Judge and his fiat for process obtained.

There is error; the decretal order will be

PER CURIAM.

Reversed.

Cited: *S. v. Black*, 60 N. C., 264; *White v. White*, 84 N. C., 342; *Jackson v. Jackson*, 105 N. C., 438; *O'Connor v. O'Connor*, 109 N. C., 143; *Ladd v. Ladd*, 121 N. C., 121; *Vann v. Edwards*, 128 N. C., 428; *Dowdy v. Dowdy*, 154 N. C., 559; *Alexander v. Alexander*, 165 N. C., 46.

Dist.: *Taylor v. Taylor*, 76 N. C., 435.

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MATURIN HERNDON and others against WILLIAM N. PRATT and others.

1. An administrator *durante minoritate* is liable for a *devastavit* to the executor, who qualifies after coming of age, and if such executor abstain for ten years from bringing suit, his cause of action is presumed to have been satisfied, released or abandoned. So that persons having a contingent interest in remainder, which is injured by such *devastavit*, must look to the executor and not to the administrator *durante minoritate*, or the sureties on his administration bond.
2. No suit, in equity, can be brought to follow slaves, limited in contingent remainder, in the hands of one claiming a present defeasible interest, after the slaves have died; they having died in the lifetime of the first taker.
3. Where slaves, limited in remainder on a contingency, were sold under an execution against one claiming a present, absolute interest, it was *Held*, that the purchaser under such execution, who took possession and held them for more than three years got a title by the statute of limitations.
4. Where the statute of limitations is a bar to a trustee, it is also a bar to the *cestui que trust*, for whom he holds the title.

CAUSE removed from the Court of Equity of ORANGE.

Joseph Dickson, of the county of Orange, died in 1834, having made his last will and testament; among the bequests, in which will, is the following: "I give and bequeath to my respective friends, Hugh Waddell, Robert W. Dickson, and Priestly H. Mangum, attorneys at law, and to the survivors of them, the executors and administrators of the survivor, in trust, one negro woman, named Coelia, one negro woman, Milly, one negro boy, named Harry, one boy, named Jackson, one negro fellow, named Davie, one negro boy, named Prince, the land and premises where I now live, with all my stock, etc., to be applied to the maintenance and support of my daughter, Julia Neville Dickson, and my grandson, Robert William Dickson, until he arrives at mature age, in such manner and in such way as they, in their discretion, may deem most suitable to their circumstances, and it is my will and desire, that on the death of my daughter, Julia N. Dickson, the said trustee, or survivor of them, or the executors or administrators of the survivor of them, do give all my estate, hereby given to them, in trust, for the maintenance and support of my said daughter Julia N. Dickson, to my grandson, Robert Wm. Dickson, hereinbefore mentioned." And by a codicil to said will, he bequeathed as follows: "If Robert Wm. Dickson should die before my daughter, Julia N. Dickson, then the property I will him to go to my daughter, Mary M. Herndon, and at her death, to be equally divided between her children and Mary Ann Dickson and Caroline Dickson, now the wife of Joseph B. Marcom." Hugh Waddell, P. H. Mangum, and the said Robert Wm. Dickson were appointed executors as well as trustees to this will, of whom, the last mentioned, was under age at the time of the death of (329) the testator, and the other two, Messrs. Waddell and Mangum, renounced the office of executor, formally, and refused entirely to act as trustee; whereupon, at May Term, 1834, of Orange County Court, the said Julia N. Dickson was appointed administratrix, with the will annexed, during the minority of Robert W. Dickson; but at February Term, 1836, of that county court, the latter having become of age, came into court and qualified as executor, under the will. The said Julia N. Dickson, on being appointed, instead of giving a bond, conditioned to discharge the office of administratrix *cum testamento annexo durante minoritate*, gave a bond as administratrix generally, and a printed form, applicable to the latter office, was filled up by the clerk, through a mistake, and executed by her with the defendants, William N. Pratt and Anderson Clements, as her sureties, in the penal sum of \$6,000. The said Pratt and Clements, at the time of becoming such sureties, took a deed of trust from Julia Dickson, embracing most of the slaves, bequeathed as above, for their indemnity. The said Julia took posses-

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sion of the land, negroes and other property, amounting, in value, to \$3,000. Shortly afterwards, she married one Samuel Merritt, a very dissolute and wasteful man, and although he entered into marriage articles not to sell any of the property of his wife, without her consent and that of R. W. Dickson, he and she together sold and wasted most of the personal estate; several of the slaves and the land were levied on by executions against Merritt, and sold to divers persons, among which, a slave, by the name of Madison or Bob, was, in 1836, sold to the defendant, David George, who took the slave into possession and has held him adversely ever since. Two other slaves, Coelia and her child, Jim, and another slave, were sold about the same time, under an execution in like manner issuing against the said Samuel Merritt, and bought by the defendant, John Hayes, who took the sheriff's title to the same, and has held the possession ever since. Two other slaves, named Harry and Prince, were sold by Robert W. Dickson, the executor, after he qualified, to the defendant, William N. Pratt, who took the same (330) into his possession and held them for several years, but both these slaves died in the lifetime of the said Robert W. Dickson.

The bill is filed by the administrator of Mary M. Herndon and her children, and the administrator of Robert W. Dickson, and the administrator *de bonis non* of Joseph Dickson and Mary Ann Dickson and Caroline Dickson, alleging that Robert William Dickson died in 1853, leaving the said Julia N. Dickson (now Merritt) surviving, and that by the said codicil, they are entitled to the whole of the said property, with its increase and profits, reserving to the said Julia N. Dickson a subsistence out of the same. They allege that Robert W. Dickson was a weak, drunken, stupid person, entirely incapable of managing property, and that he was a mere instrument in the hands of Merritt and his wife and William N. Pratt; that Pratt encouraged these prodigal habits and dissipated courses in young Dickson, by furnishing him with ardent spirits, and he combined with the others to squander the property while it was in the hands of the administratrix *cum. tes. an.* and encouraged and stimulated Robert, the executor, to do the same after he qualified; that in fact, Robert W. Dickson never interfered with the property after he qualified, but permitted the said Julia and her husband, Merritt, with the concurrence of the two sureties, Pratt and Clements, to go on and sell and waste the property as they had been doing. The bill alleges that Hayes and George were cognizant of all these doings, and that they purchased the slaves, above stated, with full notice of plaintiffs' equity. They allege that the processes under which these sales took place, were merely pretended, in order to enable these purchasers to get the property in this way. They show that all the said property has gone out of the hands of the said Julia N. Merritt, and that her husband

has left her, and both are insolvent; that Robert W. Dickson died without any of the estate in his hands, and utterly insolvent. The prayer is to subject Pratt and Clements, the sureties of Julia N. Dickson, as if the bond had been taken as it was intended; and (331) to make them liable for all the property wasted by Merritt and his wife; also to follow the slaves, Harry and Prince, in the hands of Pratt, and the slave, Madison or Bob, in the hands of David George, and Coelia and Jim and Coelia's increase since the sale, in the hands of Hayes.

Also, that an account may be taken under the direction of this Court, of the whole of the trust fund, with the rents, hires and interest accrued, and that the same may be placed in the hands of a trustee, or in the hands of plaintiffs, on giving bond to support Julia N. Merritt, during her life, and for general relief.

The answers of the defendants, deny all fraud and combination, and insist upon the statute of presumption of satisfaction, and Hayes and George plead and insist upon the statute of limitations.

The clause was set for hearing on bill, and amended bill, and answers, and proofs, and exhibits, and sent to this Court by consent.

Graham and Norwood, for the plaintiff.

J. H. Bryan and Winston, Sr., for the defendants.

PEARSON, C. J. 1st. The perishable property and the negro which was sold by the administratrix, with the will annexed, *durante minoritate*:

The bill seeks to charge Pratt and Clements, who were the sureties of the administratrix, on the ground, that the bond which they executed, was, by mistake of the clerk, drawn in a way so as to be inoperative, but in equity, they are held liable to the same extent as they would have been liable at law on the bond, had it been properly filled up, and the administratrix *de bonis non cum testamento* of the testator charges the sureties of the administratrix with a devastavit, and asks for an account of her administration.

Admit, under the authority of *Armstead v. Boseman*, 36 N. C., 117, the liability of Pratt and Clements to the same extent as if the bond had been properly filled up, the administrator *de bonis non* (332) of the testator meets with this difficulty: In 1836, Robert Dickson, one of the executors, attained his age of twenty-one, and qualified. This cause of action in equity, to hold the sureties of the administratrix to an account for any devastavits during his minority, then accrued to him. He lived until 1853, seventeen years, during all of which time it was his duty, and interest, to assert this equity. Pratt and Clements were aware of their liabilities, as is proven by the fact of the deed of

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trust, which they took for their indemnity, and yet they permit the slaves included in the trust to be otherwise disposed of. These facts, taken in connection with the article of agreement executed between Merritt and his wife, and Robert Dickson, the executor and trustee of Joseph Dickson, seem sufficient to prove, as an open matter of fact, that the cause of action or equity of the executor against the administratrix *cum tes. durante minoritate*, was satisfied. But suppose the proof should fall short, as an open question of fact, a presumption is raised by the statute law, after the lapse of ten years, that this equity, or cause of action in equity, has been satisfied, released or abandoned.

The reply made on the part of the plaintiffs is not tenable, either as a matter of law or by the proofs on the question of fact. The testator appointed Robert Dickson one of his executors; on arriving at age, he was entitled, and did qualify as executor of his grandfather's will. There was no ground on which the County Court could have refused to permit him to qualify. He was a drunken, trifling young man, but there is no proof tending to show that he was an *idiot*; in fact, there is no allegation to that effect in the bill; and his being a weak-minded, imbecile young man, addicted to drink, did not authorize the County Court to refuse to permit him to qualify, or at all events does not authorize this Court to treat his appointment as a *nullity*, and on that ground to grant relief as if the estate of Joseph Dickson had been without a representative, or person capable of suing in its behalf, from 1836 up to the death of Robert Dickson in 1853.

2d. The two negroes sold by the executor, Robert Dickson, to (333) the defendant Pratt:

The equity is put upon the ground of following the trust fund in the hands of a purchaser with notice. Admit the equity, and waive any reference to the difference between a sale by an executor and a sale by a trustee, it has so happened that in point of fact this part of the trust fund has become extinct by the act of God, both of the negroes having died in the lifetime of Robert Dickson. So the contingent limitation over did not vest at his death, because the subject matter of the bequest was not, at that time, *in esse*. So this equity must fail; there being no allegation or proof that the death of these slaves was caused, or in any way hastened by the fact of their having been sold, and put into the possession of Pratt, by the executor. On the contrary, the proof is, that Pratt treated them as his own property, and took very good care of them. The claim of the plaintiffs to the *profits and hires* of the two negroes sold to Pratt, accrued while the negroes lived, can not be supported. The negroes belonged to Robert Dickson, absolutely, subject to a limitation over, after his death, to the plaintiffs; so Pratt had a good title during the life of Robert Dickson, and consequently, was

entitled to the profits and hires accruing before his title was defeated by the happening of the contingency on which the negroes were limited over; which limitation over, as we have seen, was prevented by the deaths of the negroes, before the happening of the contingency, and so the limitation over failed to take effect by the extinction of the subject of the bequest.

3. The negroes sold under an execution against Merritt and purchased by Hays and George:

This sale was made in 1836, since which time Hays and George have been in the adverse possession of the negroes purchased by them respectively. Under the statute of limitations, this adverse possession gave them the title, not only against Robert Dickson, but also against the persons entitled to the limitation over, for whom he held the title as trustee. The principle, that when the statute of limitations is a bar to the trustee, it is also a bar to the *cestui que trust* for whom he holds the title, and whose right it is his duty to protect, is settled; (334) *Wellborn v. Finley*, 52 N. C., 228. In delivering the opinion in that case, the principle was considered so plain that it was deemed unnecessary to cite authorities, and the Court was content to leave the question on the manifest *reason of the thing*. For statutes of limitation and statutes giving title by adverse possession would be of little or no effect if their operation did not extend to *cestuis que trustent*, as well as trustees who hold the title for them, and whose duty it is to protect their rights. If, by reason of neglect on the part of the trustees, *cestuis que trustent* lose the trust fund, their remedy is against the trustees, and if they are irresponsible, it is the misfortune of the *cestuis que trustent* growing out of the want of forethought on the part of the maker of the trust under whom they claim. The question, however, having been discussed at the bar, we will now refer to *Lewin on Trusts*, 24 Law Lib., 306, and the cases there cited, which will warrant the conclusion that the doctrine is settled.

On the whole, we have arrived at the conclusion that the persons entitled under the limitation over have no remedy, except against the executor and trustee, Robert Dickson, who is dead—insolvent—and against whose representative no relief is prayed, and they must ascribe their disappointment in losing the benefit which they expected to have realized under the limitation to the fact that the two respectable and competent gentlemen who were named by the testator as executors and trustees, in connection with his grandson, Robert Dickson, refused to qualify as executors or act as trustees, in consequence of which Robert Dickson, on arriving at age, became the only executor and trustee, and proved to be incompetent and faithless.

The allegation of fraud and collusion on the part of Hays and George,

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with the executor and trustee, Robert Dickson, which is made in order to prevent the application of that statute in respect to the plaintiffs claiming as *cestuis que trustent* under the limitation over, is not supported by the proofs.

PER CURIAM.

Bill dismissed with costs.

Cited: Clayton v. Rose, 87 N. C., 110; *Cheatham v. Rowland*, 92 N. C., 344; *Clayton v. Cagle*, 97 N. C., 303; *King v. Rhew*, 108 N. C., 701, 703; *Culp v. Lee*, 109 N. C., 679.

Dist.: Academy v. Bank, 101 N. C., 489.

(335)

COTESWORTH H. RHYNE and another against JONAS HOFFMAN, Adm'r, and others.

1. A child is, in law, legitimate, if born within matrimony, though born a week or a day after marriage.
2. A child begotten while the parties were man and wife, but not born until six months after the husband had obtained a divorce from the bonds of matrimony on account of the wife's adultery, will be taken to be legitimate, unless it be proved, by irresistible evidence, that the husband was impotent or did not have sexual intercourse with his wife.

CAUSE removed from the Court of Equity of GASTON.

About February, 1834, the defendants' intestate, Simon Rhyne, married a woman by the name of Nancy Lay, and about six months after this marriage she had a child, the present plaintiff, Cotesworth H. Rhyne. After the marriage, she went home with her husband and remained with him for about three months, when he drove her off, and she returned to her former place of abode, about a mile distant from the home of her husband. The said Simon filed a petition for a divorce in the Superior Court of Lincoln, at the Spring Term, 1835. At Spring Term, 1836, of that Court, he obtained a decree for a divorce from the bonds of matrimony (on account of adultery), but in less than nine months after this decree the said Nancy was delivered of another child, the plaintiff Isaac T. Rhyne. The mother, during all this time, lived within a mile of the said Simon Rhyne, but under the influence and control of one Elisha Jones, to whom she had prostituted herself before her marriage with Mr. Rhyne. The evidence of Elisha Jones, testifying to his opinion that the plaintiffs were his children, also the declarations of the mother to the effect the plaintiffs were not the children of Simon Rhyne, were filed in the case, subject to exceptions. The cause was set down for hearing on the bill, answers, exhibits and proofs, and sent to this Court.

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Fowle, for the plaintiff.

No counsel for the defendant appeared in this Court.

BATTLE, J. The right of the plaintiffs to distributive shares in the estate of the intestate of the defendant, Jonas Hoffman, depends upon their legitimacy. The question in relation to the plaintiff Cotesworth H. Rhyme has been long settled. In 2 Com. Dig., 117, (336) it is stated that a child is legitimate if born within matrimony, though born within a week or a day after the marriage. So, if the woman be big with child by A, and marry B, and then the child is born, it is the legitimate child of B; 1 Rolle's Abr., 358; 2 Bac. Abr., 84. It is admitted in the pleadings that this plaintiff was born within five or six months after the marriage of his mother with the intestate, which brings him within the rule established by these authorities.

The claim of the other plaintiff stands upon a principle somewhat different. He was begotten while the parties were man and wife, but was not born until six months after the husband had obtained a divorce *a vinculo matrimonii*, on account of adultery. During the time when the child was begotten, the husband and wife lived separately, but in the same neighborhood, near enough for the husband to visit her, and it is proved that, occasionally, he did go to the house where she was staying. There was, then, an opportunity for sexual intercourse between the parties, and from that the law presumes that, in fact, there was sexual intercourse between them. This plaintiff must, therefore, be taken to be legitimate, unless it be proven by irresistible evidence that the husband was impotent or did not have any sexual intercourse with his wife; but the former is not pretended, and the latter is a fact which neither the wife nor the declarations of the wife is admissible to prove; *Rex v. Luffe*, 8 East, 193. Here, independent of the declarations of the wife, which must be rejected as incompetent, there is no testimony sufficient to rebut the presumption of access.

Such being the case, the proof that the plaintiffs' mother lived in adultery with a man, who testified that he was the father of her children, makes no difference. As was said in the case of *Morris v. Davies*, 14 Eng. C. L., 275: "It matters not that the general camp, pioneers and all, had tasted her sweet body, because the law fixes the child to be the child of the husband."

It must be declared that the plaintiffs are the legitimate children of Simon Rhyme, deceased, and as such are entitled to distributive shares of his estate.

PER CURIAM.

Decree accordingly.

Cited: Ewell v. Ewell, 163 N. C., 236.

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(337)

ELIJAH FUTRILL against LITTLEBERRY FUTRILL.

Where one, having considerable influence over an old man, feeble in body and mind from a long course of intemperance, procured from the latter a deed for his land when he was without counsel, and in no condition to understand it, wherein was recited a large debt, which had no existence, and about which the grantee answered vaguely and evasively, it was *Held*, that although no confidential relation was proved then to exist between the parties, yet, that such deed, on the score of fraud and imposition, should be held only as a security for sums actually due.

CAUSE transmitted from the Court of Equity of NORTHAMPTON.

This cause was heard in this Court at December Term, 1859, on a motion to dissolve the injunction, and is reported in 58 N. C., 61. The main facts of the case are herein set forth as derived from the bill and answer, and wherever these are modified by the proofs on file, it is clearly noted in the opinion of the Court; so that it seems to the reporter unnecessary to restate the case in this connection.

Batchelor and *Conigland*, for the plaintiff.

Barnes, for the defendant.

BATTLE, J. This cause has now come on for a final hearing, and after a full consideration, we have arrived at the same conclusion with regard to the judgment obtained by the defendant on the bond mentioned in the pleadings, which we expressed when we decided to sustain the injunction, which had been obtained against that judgment. The decision was made at December Term, 1859, upon a motion, founded on the answer to the bill, for a dissolution, and is reported in 58 N. C., 61. The judgment at law is allowed to stand as a security to the defendant for whatever may be found, upon taking an account between the parties, to be justly and fairly due from the plaintiff, as the consideration of the bond on which the judgment was obtained.

In taking such account, however, the master will not allow the defendant a credit for any article, or articles, sold to the plaintiff, unless, under the circumstances, it was proper and necessary, for the latter to have it or them. As, for instance, the master will be at liberty to enquire whether the defendant ought to have furnished the plaintiff (338) with spirituous liquors to the value of \$404.25, during nine months of the year 1859; and if not, he will refuse a credit for whatever he may find to have been an excessive quantity of that article.

Having disposed of the question raised with respect to the judgment on the bond, we come now to the consideration of that which relates to the deed executed by the plaintiff to the defendant for his land, and all

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his other property, with the reservation of a life estate, founded upon the expressed consideration of \$2,500, in a debt due from the former to the latter, and a covenant by the latter to support the wife of the former, should she become his widow, and so long as she should continue such. The first enquiry that is presented in this part of the case is, whether before, and at the time when the deed was executed, to wit, 23 March, 1857, the confidential relation of principal and agent existed between the parties?

From an examination of the pleadings and proofs, we are satisfied that it did not. The bill alleges that the relation commenced in the early part of the year 1857, without specifying the precise time, and the answer admits the allegation in the same terms. The proofs are equally indefinite as to the time, and from the whole, we conclude that the defendant became the general manager and agent of the plaintiff immediately after the execution of the deed, and no doubt in consequence of it. It follows that the force and effect which this Court may give to the deed can not be governed by the principle which we hold to be applicable to the judgment on the bond; and that if the deed can be impeached, it must be on the ground of fraud, circumvention or undue influence; *Deaton v. Monroe*, 57 N. C., 39. The allegations of the plaintiff with respect to the execution of the deed are, in substance, that the defendant, being his kinsman and neighbor, and professing to be his friend, had acquired great influence over him; that he, the plaintiff, by a long and habitual course of intemperance, had become very much enfeebled, both in body and mind, and that the defendant, availing himself of his influence, procured from him the execution (339) of the deed when he was in no condition to understand, and did not understand, its contents, and under circumstances which precluded him from seeking and obtaining the counsel and advice of a disinterested friend. The plaintiff then avers expressly that the consideration expressed of a debt of \$2,500, due from him to the defendant, was false; for that he was then not indebted to him at all, or, at most, was indebted only for a very small store account. He also avers that the other part of the consideration, to wit, the maintenance of his wife, should she become his widow, was scarcely appreciable, for that she was in very low health, and was not expected to live, and, in fact, did not live but a few months. The property conveyed is alleged to have been of much greater value than the amount of the consideration set forth in the deed, supposing it to have been truly recited.

These allegations are expressly denied by the defendant, who avers that the deed was drawn according to the wishes of the plaintiff, who executed it willingly, and with a full knowledge of its contents, and who, though old and intemperate, had sufficient capacity to understand and

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transact the business. As to the money part of the consideration, the defendant states that the plaintiff was "justly indebted to him in a large amount."

The parties being thus at issue, with respect to the mental imbecility of the plaintiff, and the exercise of undue influence over him by the defendant, as well as to the consideration mentioned in the deed, we have examined the proofs on file which relate to those subjects. We shall not attempt to state, in detail, the result of our examination, but shall merely say that we are satisfied that at the time when the deed bears date, and for some months before, the plaintiff had capacity sufficient to enable him to understand and to transact ordinary business, but he was old and in feeble health, and his mind had been so much weakened by long continued and habitual intemperance that he could be easily influenced to do anything which a person in whom he had confidence desired; that the defendant was his kinsman and (340) neighbor, had been kind to him, and had acquired great influence over him, and that he, through the means of that influence, unduly exercised, procured the execution of the deed in question. Among the circumstances of suspicion against the defendant is that of the recital of the pecuniary consideration of \$2,500, in a debt due from the plaintiff to him, which he does not attempt to explain in his answer, and of the existence of which he furnishes us no evidence. To the positive allegation of the plaintiff that he at that time owed him nothing at all, or if anything, only a very small store account, the defendant merely answers that the plaintiff was "justly indebted to him in a large amount," without explaining how the indebtedness arose, or how it was evidenced, whether by bond, note or open account; and among all his proofs we do not find any evidence of it. The vagueness of the answer as to the amount, and the absence of any explanation as to how it arose, prevent us from coming to any other conclusion than that there was either no indebtedness at all, or a debt of a very trifling sum. We are not to be understood as holding that a consideration was necessary to sustain the deed, as between the parties, had the conveyance been fairly obtained. The plaintiff was, we think, capable of executing a conveyance of his property, and if, without any fraud, circumvention or undue influence practiced upon or exercised over him, he had made a voluntary deed in favor of the defendant, we should have upheld it, and in doing so we should have been sustained by the authority of adjudications, both in England and in this State; *Hunter v. Atkins*, 3 Myl. and Keen, 113; *Taylor v. Taylor*, 41 N. C., 26. But when we find that the defendant resorted to the expedient of pretending a debt which had no existence, for the purpose of obtaining a conveyance of all the plaintiff's property, subject to his life-estate therein, we are not at liberty to give it any

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greater effect than to permit it to stand as a security for any sum which may have been really due to him from the plaintiff. There must be a decree for an account between the parties upon the principles herein expressed.

PER CURIAM.

Account ordered.

Cited: Bellamy v. Andrews, 151 N. C., 258; *Pritchard v. Smith*, 160 N. C., 84.

JUNE TERM. 1863.

(AT RALEIGH.)

(341)

W. H. PARTIN and another against T. S. LUTERLOH and others.

1. That a note had been obtained by fraud in the *factum*, is a good defense at law, and cannot afterwards be brought forward for the purposes of an injunction.
2. It is no ground for a bill for an injunction, that the complainant was not a party to the suit at law, because that process had not been served on him. His proper remedy is to have the judgment set aside, on motion, in the court granting it.

CAUSE transmitted from the Court of Equity of CUMBERLAND.

This was a bill for an injunction, filed in the names of William H. Partin and Norman G. McLeod against T. S. Luterloh, Charles Luterloh, W. H. Lambert and Thomas Lambert. The object of the (342) bill is to restrain the collection of a judgment and execution, which was obtained in the County Court of Cumberland, on a note for \$416.52, dated 16 June, 1852, payable to T. Luterloh & Co., and endorsed to Charles Luterloh. Signed by W. H. & T. Lambert and W. H. Partin and N. G. McLeod.

W. H. Partin was engaged in the business of getting turpentine in the county of Johnston, where W. H. and Thomas Lambert were engaged in the same business as partners, and where the two latter resided. The bill alleges, in behalf of Partin, that he had consigned spirits of turpentine to T. S. Luterloh, who owed him a balance on that account, and that Thomas Lambert, being about to visit Fayetteville, where Luterloh resided, he requested him to settle with Luterloh, and bring him the money that was due him, and to enable him to do so, he signed his name on a blank piece of paper, in order that it might be filled up as a receipt for the money when it might be paid; that Thomas Lambert, pretending that Partin wished to get money to the amount of \$200 from a bank in Fayetteville, applied to the plaintiff, N. G. McLeod, to join in the note with Partin and the firm to which he belonged, and as an inducement for McLeod to sign the note, he offered to draw it for four hundred dollars, and out of the proceeds to pay a debt of \$125 which Lambert's father owed McLeod, and with the understanding that the note was to be thus filled up and offered for discount at a bank, he also signed it in blank. The bill then states that McLeod proceeded with Thomas Lambert to Fayetteville, and the blank paper, then having the names of W. H. and

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T. Lambert on it, was handed to T. S. Luterloh, who had promised to assist them in getting the paper discounted, and he departed for the purpose of going to the bank on the business; that in a short time he returned and announced that he had failed in procuring the discount, on which McLeod, in the presence of T. S. Luterloh, asked for the paper that had his name on it; to which T. Lambert said it did not matter, as the paper was still in blank and could not hurt him; that he then instructed T. Lambert to erase his name from the paper; that (343) without the consent of either Partin or McLeod, the note in question was filled up, payable to T. S. Luterloh. Partin further says that he was not served with the writ in the suit at law, and had no knowledge of its pendency against him, or of the existence of the judgment until after its rendition. It is further alleged that the endorsement was made to Charles Luterloh without consideration, but to give jurisdiction to the County Court of Cumberland. The prayer is for an injunction. T. S. Luterloh denies, in his answer, that he owed Partin anything, or that there was any open account between him and this defendant, or the firm; he admits that there had been some dealings, but says that these had been closed before the transaction in question. He states that the true history of the transaction is this: Thomas Lambert and plaintiff, N. G. McLeod, came to Fayetteville, and asked his assistance to have a note discounted in a bank at that place, and they produced to him a paper, subscribed in blank by W. H. and T. Lambert, W. H. Partin and N. G. McLeod. It was stated by them that they wished to get \$1,000 from the bank, and out of that sum, a debt, which the firm of W. H. & T. Lambert owed his firm, should be paid; that he endeavored to procure the bank accommodation, but found it could not be obtained, and so informed the other party—thereupon, it was agreed by Thomas Lambert and N. G. McLeod that the blank paper should be filled up for the debt due his firm, and this was done accordingly. Charles Luterloh answers, that the note was endorsed to him *bona fide* for a debt due him by T. G. Luterloh & Co.

Graham, for the plaintiffs.

Gorrell, for the defendants.

BATTLE, J. We are unable to discover any equity in the transactions disclosed by the pleadings and proof that entitles the plaintiffs to the injunctive relief which they seek. The allegation that the plaintiff at law, Charles Luterloh, took the endorsement of the note in question without consideration, and merely for the purpose of giving (344) jurisdiction to the Court of Pleas and Quarter Sessions for Cumberland County, is positively denied in his answer, and, on the contrary,

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he avers that he took it *bona fide* and for a valuable consideration. His right to recover on it at law is fully sustained by the recent case of *McArthur v. McLeod*, 51 N. C., 476.

The authority of Thomas Lambert to bind his partner by signing the note in the name of the firm, for a debt of the firm, is unquestionable. The partners would be bound in such a case, even though the particular note was signed by one partner without the consent and against the wishes of the other; *Wharton v. Woodburn*, 20 N. C., 647; *Dickson v. Alexander*, 29 N. C., 4.

Had the note been obtained by fraud in *the factum*, that would have been a good defense at law, and could not afterwards be brought forward for the purposes of an injunction in equity; *Tysor v. Luterloh*, 57 N. C., 247.

The objection to the validity of the judgment as to Partin, urged by him on the ground that he was not a party to the suit at law, because no process had been served on him, is very clearly one to be used at law, and cannot be made available in equity. The proper course to be pursued in such case is to apply to the Court in which the judgment was rendered for the purpose of having it set aside on motion. Whenever that, or any other complete remedy can be given at law, a court of equity will not interfere; *Parker v. Jones*, 58 N. C., 276. The injunction must be dissolved and the bill

PER CURIAM.

Dismissed.

(345)

NEILL MALLOY against CHARLES B. MALLETT and others.

1. Upon the dissolution of a corporation by the expiration of the time for which it was chartered, its debts become extinct.
2. Under a provision in an act of incorporation, "that the private property of the individual stockholders shall be liable for the debts, contracts and liabilities of the corporation," it was *Held*, that the responsibility on the individual stockholders is a secondary one, and that when the debts against the corporation became extinct by the expiration of its charter, the liability of the individual stockholders became extinct also.

CAUSE sent from the Court of Equity of CUMBERLAND.

All the facts necessary to the understanding of this cause are stated in the opinion of the Court.

Buxton, for the plaintiff.

C. G. Wright and *Bryan*, for the defendants.

BATTLE, J. Several interesting questions are presented by the pleadings, and have been discussed in the argument, but in the view which

we feel constrained to take of the case, it is only necessary for us to notice one of them. The bill was filed after the expiration of the charter of the company, for whose debts private property of the defendants, as individual stockholders, is sought to be made liable. It is a well settled principle of the common law that, upon the dissolution of a corporation, its debts become extinct. This principle was held in *Fox v. Horah*, 36 N. C., 358, to be in full force in this State. Hence, when the "Phenix Company" expired by the limitation of its charter on 1 January, 1860, it ceased to owe any debts, because it no longer had any existence by which it could be a debtor. The question, then, is, could the private property of the persons who were the individual stockholders of the company at the time of its dissolution, be made liable under the tenth section of the act of incorporation, for such of its debts as were then unpaid? The proper answer to this question depends upon an- (346) other enquiry, that is, whether the responsibility imposed by the act upon the individual stockholders is a primary or only a secondary liability. The language of the charter, after creating the corporation, with the usual powers and privileges for the purpose of manufacturing wool and cotton goods, and after prescribing various regulations ordinarily found in charters of the like kind, declares in the tenth section "that the private property of the individual stockholders shall be liable for all the debts, contracts and liabilities of the corporation in proportion to the stock subscribed by each individual." The responsibility thus imposed upon the individual stockholders is, we think, manifestly a secondary one, because it makes them liable for the debts of another person, to-wit, the corporation. Such a liability was amply sufficient for the security of the creditors of the company, should they be diligent in enforcing it, during the existence of the corporation, while, to have made it greater, would, in a considerable degree, have tended to defeat the purposes for which the company was created. The liability of the individual stockholders being thus a secondary one for the debts of the company, it follows that when the corporation expired and its debts became thereby *extinct*, their liability became *extinct* also. As long as there were debts of the company to be paid, the stockholders were bound to pay them, if necessary, out of their private means; but when the debts of the corporation ceased to exist, as such, there remained nothing upon which to attach a responsibility on those who had been members of the defunct company.

This view of the subject is sustained, as we think, by the analogy which it bears to the remedy, which is given by the Act of 1806 (Rev. Code, chap. 50, sec. 7), to creditors against the persons to whom debtors have made a fraudulent conveyance of their property. The remedy given is a *scire facias* upon the judgment obtained by the creditor against

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his debtor, against the person to whom the property of the debtor has been fraudulently conveyed for the purpose of defeating the (347) debt. In *Wintry v. Webb*, 14 N. C., 27, it was decided that the proceeding depended upon the original action of the creditor, and to sustain it, the judgment in that action must be in force. Hence, when it appeared in the case that the defendant in the judgment in the original suit was dead, and no person had administered upon his estate, *it was held* that the *scire facias* against the alleged fraudulent grantee could not be sustained. In that case, the secondary proceeding depended upon the existence of a valid judgment, in the first, while in the case now before us the proceeding against the individual stockholders depends upon the existence of a debt of a corporation, of which they are members. The dormancy of the judgment in the one case, and the extinction of the debt in the other, alike deprive the creditor of his remedy. The demurrer must be sustained, and the bill

PER CURIAM.

Dismissed.

Cited: Von Glahn v. DeRosset, 81 N. C., 472.

BENJAMIN Y. SIMS, Adm'r, against BENJAMIN SMITH and others.

The word "when," like the words "at" and "if," applied to a legacy of personality, makes the gift contingent; but the superaddition of the words, "equally to be divided" (when there are several legatees), shows that the words, *when*, etc., were only used to designate the time when the enjoyment of the legacy was to commence, and would not prevent it from vesting.

CAUSE removed from the Court of Equity of FRANKLIN.

The bill was filed by the plaintiff Sims as administrator of his late wife, Sally Ann (formerly) Smith, for partition of slaves bequeathed to her, with the other defendants, by the will of Joseph Smith; and the only question in the cause depends upon the construction of the following clauses in said will: "I give to my son Joseph Smith's children, (348) now living, that is, Benjamin Smith and Adam Smith, the land whereon I now live, on the east side of Mill Creek, to be equally divided between them and their heirs forever," reserving a life-estate therein to Joseph Smith, their father. * * * "And I also give the following negroes, to my son Jos. N. M. Smith's five children now living, viz., Sally Ann Smith, Martha Smith, Benjamin Smith, Abner Smith and Joseph Moseby Smith, when the youngest arrives to lawful age, the following negroes and their increase, Harriet, etc. (twelve in number, naming them), to be equally divided between them and their heirs for-

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ever, reserving, as aforesaid, to my son, Joseph N. M. Smith, in the land, including the mill and negroes, during his natural life." The bill alleges, that all the above grandchildren were living at the testator's death, and that Sally Ann Smith intermarried with the plaintiff, and died about seven years after the death of the testator, in the lifetime of her father, and before Joseph Moseby Smith, who was the youngest child of the testator, arrived at the age of twenty-one. The bill alleges, that on the death of Joseph N. M. Smith, his son, the defendant, Benjamin, became his representative, and took charge of the slaves, and held them for himself and the other children of Joseph N. M. Smith, exclusively of the plaintiff, as representative of the said Sally Ann, his late wife, and that he denied the plaintiff's right, upon the ground, that Joseph Moseby Smith, the youngest, was not of age when said Sally Ann died. This fact is admitted in the bill, but the plaintiff insists that the legacy was vested on the death of the testator, and that the age of the youngest was fixed for division between them, subject to the life-estate of their father.

The prayer is for a partition of the slaves. The defendants demurred to the bill, and there being a joinder in demurrer, the cause was set down for argument and sent to this Court.

B. F. Moore, for the plaintiff.

No counsel for the defendants.

BATTLE, J. The only question presented for our consideration, depends upon the proper construction of the following clause of the will of Joseph M. Smith: "I give the following negroes to (349) my son, Joseph N. M. Smith's five children, now living, viz.: Sally Ann Smith, Martha Smith, Benjamin Smith, Abner Smith and Joseph Moseby Smith, when the youngest arrives to lawful age, the following negroes and their increase, to-wit: Harriet," etc., "to be equally divided between them and their heirs forever, reserving, as aforesaid, to my son, Joseph N. M. Smith, in the land, including the mill and negroes, during his natural life." The testator, in a previous clause of his will, had given to his two grandsons, Benjamin and Abner Smith, a tract of land, equally to be divided between them, reserving a life estate therein to their father, Joseph N. M. Smith. Sallie Ann Smith, after the death of the testator, married, but died before the youngest of the five children of Joseph N. M. Smith arrived at full age, and the question is presented on the claim of her husband, as her administrator, whether the legacy of the slaves is vested, or contingent.

It is conceded that the word, "when," like the words "at" or "if," applied to a legacy of personalty ordinarily makes the gift contingent.

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Thus, if a negro were given to A, when he arrives at age, with nothing to explain or control the expression, it would be the same as if the legacy were given to him "at" his arrival of age, or "if" he arrived at age, and should, consequently, be construed to be conditional upon his arrival at age. But when it appears from the context, or from the general scope of the will, that the testator intended to designate only the time when the enjoyment of the legacy is to commence, there the legacy will be held to be vested. Among other expressions, to which this effect will be given, is that of "equally to be divided between them," where there are several legatees. The law, it is said, always leans in favor of holding legacies vested, rather than contingent, where the clauses, in which they are given, are ambiguous, and the intention doubtful; *Stuart v. Bruar*, 6 Ves. Jun'r., 529; *Litwell v. Bernard*, *Ibid.*, 522. In most cases this expression of "equally to be divided between them," will apply, as (350) well to the time of enjoyment, as to the gift itself, and hence, in such cases the legacy will be taken to be vested. In the case now before us, there is nothing to forbid the application of this rule, and the legacy of the slaves must be considered as having vested at the death of the testator, the division among the legatees not to take place until the arrival of the youngest at full age—the whole legacy having been subject to the life of their father; see *Guyther v. Taylor*, 38 N. C., 329.

PER CURIAM.

Demurrer overruled and cause remanded.

STANFORD LONG against JOHN H. CLAY, Adm'r.

Where a bill was filed for the settlement of copartnership dealings, and there is a prayer for an injunction against a bond given on a partial settlement of the business between the partners, but no injunction was issued, it was *Held*, that the obligor, in said bond, was not in contempt of the court of equity in refusing to submit to a judgment on the bond in a court of law.

APPEAL from the Court of Equity of PERSON, *Osborne, J.*

The facts of this case are fully set forth in the opinion of the Court.

No counsel appeared for the plaintiff in this Court.

Graham, for the defendant.

BATTLE, J. John H. Clay, administrator of William Long, brought debt on a bond for \$1,292.75, payable to his intestate against Stanford Long, as the obligor thereto. The suit was brought in the Superior Court of Law for Person County, and defendant appeared and pleaded payment and set off. While the suit was pending, the defendant filed a bill in the Court of Equity for the same county in which he

alleged that he and the plaintiff's intestate had, some time before, (351) been engaged as partners in the manufacture of tobacco; that they dissolved the co-partnership by consent, and had a partial settlement, upon which he gave the bond sued upon at law. He then alleged that there were many outstanding debts against the firm, of which he was not aware, when he gave the bond in question; that upon a settlement of the accounts of the firm, very little, if anything would be due the plaintiff; that he had no defense against the suit at law; and he prayed for an account of the partnership business and for an injunction against the suit until that account should be taken. The plaintiff, at law, filed an answer to the bill. It did not appear that any injunction had been issued. When the suit at law was called for trial, the plaintiff's counsel announced his readiness to proceed, and, informing the Court of the pendency of the proceeding in the court of equity, demanded that the defendant should submit to a judgment, threatening that if he did not, he, the counsel, would move for an attachment against him in the court of equity. The defendant refused to comply with the demand; on the contrary, he applied for, and on cause shown, obtained a continuance of the suit. When the equity docket was taken up, the defendant in the suit in that Court, filed an affidavit, in which he stated the proceedings above mentioned, and moved for an attachment against the plaintiff in equity, for his refusal to submit to a judgment in the court of law. His Honor declined to make the order, but allowed an appeal from his order of refusal to the Supreme Court.

We approve the course adopted by his Honor. The plaintiff, in equity, did not press his application for an injunction against the suit at law, and there was nothing to hinder the plaintiff from obtaining his judgment as soon as the course and practice of the court would allow him. Had the plaintiff in equity applied for a *fiat* for an injunction, the Judge or Court, to whom the application was made, might well have refused to grant it, except upon the terms of submitting to a judgment in the suit at law. The authorities, referred to by the counsel for the defendant in equity, to wit, Adams Eq., 194-195, and 2 Star, Eq., pages 174, 175, do not embrace a case like the present. (352)

Upon another ground, we think, the correctness of his Honor's course, may be sustained. When the cause in the court of law was called for trial, no order in the court of equity had been obtained, or even applied for. The counsel only threatened what he intended to do, when the court of equity should sit for the despatch of business. The defendant at law could not then, be guilty of a contempt of Court for not obeying an order which had no existence.

The order from which the appeal was taken, must be

PER CURIAM.

Affirmed.

ROUSE v. LEE.

CALVIN ROUSE against JOHN L. LEE and others.

Money arising by the sale of the wife's land by a deed executed by the husband and wife has none of the characteristics of real estate, and after the death of the wife, goes to the husband *jure mariti*.

CAUSE removed from the Court of Equity of LENOIR.

A tract of land having descended to Rebecca Lee, wife of the defendant, John L. Lee, from her father, it was agreed between them that they would make sale of the same, and as Lee was much in debt, and there was danger that the proceeds of such sale might be taken for his debts, it was agreed by parol that the proceeds should be paid into the hands of a trustee for her benefit. Accordingly, the land was sold by a joint deed of Lee and his wife to one Wiley Rouse, she being privily examined and said Wiley Rouse paid the purchase-money, \$1,900, to one Christopher

L. Davis, who agreed to hold it for the benefit of the wife, but afterwards agreeing to borrow the money for himself, he made his note for the residue not used by Mrs. Lee, to-wit, \$1,400, to the plaintiff, who agreed that he would hold the money on the like trust, but no written memorial was ever made of this trust. Mrs. Lee having died, the plaintiff administered on her estate, and filed this bill against J. L. Lee, and the children of Lee and his wife, who are the heirs-at-law of Mrs. Lee, alleging that Lee claims the fund as husband of his late wife, and that the other defendants, the children, claim it as having the impress of realty, and he calls upon the parties to interplead and have their rights settled by a decree of the Court of Equity, so that he may be indemnified in paying it to the one party or the other.

The said John L. Lee and the children each answered the bill, claiming, as suggested above, and submitting that the Court should do what was right and equitable between them. The cause was set down for hearing on bill and answers, and sent to this Court.

J. W. Bryan, for the plaintiff.

G. Washington, for the defendants.

MANLY, J. The question presented by the pleadings in this case, is, whether a fund in the hands of the complainant, as administrator of Rebecca Lee, should be paid to the husband as her legal representative, or (as it arose originally from the sale of real estate) to her children, as heirs-at-law.

There is no ground for holding that this fund retained any of the characteristics of real property. It was competent for the parties, by a proper settlement, to have impressed this character upon it, but they have not done so, and it must, therefore, be transmitted according to the rules which govern the distribution of chattel property.

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The agreement, by which the fund was subjected to a trust, seems to have had for its object the benefit of the wife alone, and, therefore, according to a well established principle of equity, upon her death, the fund passed to her husband. This was recently declared in this Court, in *Little v. McLendon*, 58 N. C., 216, where the authorities will be found cited. (354)

The parties interested may have a reference to the clerk of this Court, to take an account of the fund and report the residue after deducting the costs of administration (the costs of this bill included), which residue should be paid to the husband.

PER CURIAM.

Decree accordingly.

Cited: Black v. Justice, 86 N. C., 511.

WILLIAM FRIZZLE and others against JOEL PATRICK.

1. It is the general course of the court of equity, on applications to restrain private nuisances by an injunction, to order an issue at law to ascertain the fact of the existence of such nuisance before the court will act.
2. Where a party has no particular interest in an alleged nuisance from the ponding back of water, he cannot sustain a bill for an injunction, but must rely on the remedy by information in the name of the Attorney-General.

THIS was an appeal from the Court of Equity of Pitt.

The plaintiffs, William Frizzle, Warren Frizzle, Charles Rogers and Jesse Hart, set forth in their bill, that the plaintiffs, William and Jesse Frizzle, conveyed each a small tract of land to the defendant and one Lewis B. Pugh, to enable them to erect a mill on little Contentnea Creek, and that they did so about 1850, and that, at the same time, the parties agreed, by parol, as a part of the equivalent for this agreement, the said Patrick and Pugh were to keep a flat in their mill-pond to transport produce for the neighborhood, and to pay them; that the said grantees did erect a mill-dam, and by that means, ponded back the water so as to injure the plaintiffs, W. and W. Frizzle, in a very great degree by overflowing their tillable land, and to injure all the plaintiffs and their neighbors by causing an uncommon amount of sickness; that the said mill, was, shortly before filing the bill, burned down, and that against their earnest remonstrances, and in disregard of large pecuniary offers on their part, the defendant, Patrick, who had purchased out Pugh, was preparing to rebuild the mill, and they apprehended the same injurious consequences to their health. They further

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allege, that the defendant totally disregarded his promise to put a flat in his mill-pond while the dam was up, and refused to make compensation to the Messrs. Frizzle for damage done to their lands by ponding back the water on them. The prayer is for an injunction to restrain the defendant from rebuilding his mill-dam and for general relief.

The answer of the defendant, denies that any extraordinary amount of sickness was produced by his mill-pond. He admits that a very fatal disease prevailed during a part of the time his pond was in existence, but he says this was a disease, called diphtheria, and as he is advised by medical men, was, in no degree, produced or aggravated by standing water; that it prevailed as much in neighborhoods where there was no watercourse as in that of his mill-pond, and has, in no degree, abated since his mill has been burned and the water off. He admits, that he said in conversing about establishing a mill, that he intended to keep a flat in his mill-pond, but he denies that he made any deliberate contract to that effect, or that this consideration entered, in a material degree, into their bargain, and that no one has ever desired such a flat, or called on him to put one in his pond and insists that, even if this was as alleged by plaintiffs, that they have an adequate remedy, at law, for the breach of this contract. He sets forth, specifically, the deeds made to him by the plaintiffs, William and Warren Frizzle, which, in the former parts thereof, are in the usual form, and then contain this clause (in the deed from William), "and I, the said William R. Frizzle, in the bargain, have bargained and sold unto the said Lewis Pugh and Joel Patrick, the full and lawful privilege of ponding the water back upon my creek low ground, above the said Lewis Pugh and Joel Patrick's mill-seat, to a sufficient head of water to run the mill, or any machinery whatever, provided the water does not back upon any of my high or tenable (356) lands; if so, we, the said Lewis Pugh and Joel Patrick, do bind ourselves and assigns to the said William R. Frizzle, a fair price for all the high or tenable land the mill may cover," and the deed from Warren Frizzle, conveyed his tract of land, by a deed, containing the like provisions. He further alleges, in his answer, that before this bill was filed, he offered to leave it to men, mutually chosen by them, to say what, if any, damages had been sustained by the plaintiff William's high or tillable lands, and to pay whatever might be assessed by them, and that he refused to agree to these terms, or in any way to settle amicably this question of damages. He insists that, according to the written contract between them, if either of the Messrs. Frizzle has any claim of this kind, he has a full and adequate remedy at law. He admits that he is about to rebuild his mill, but says that neither of these parties has any equitable ground to prevent him from so doing; that as to the Messrs. Frizzle, they are concluded by the terms of their deeds, from interfering

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through the Court, and as to the other plaintiffs, they have no interest or ground of complaint whatever.

On the coming in of the answer, the defendant moved to dissolve the injunction, which his Honor refused, but ordered it to be continued to the hearing, from which order the defendant appealed to this Court.

Fowle and Phillips, for the plaintiffs.

Donnell and J. W. Bryan, for the defendant.

PEARSON, C J. Treating the bill as a proceeding for an injunction against a private nuisance, we are of opinion that the plaintiffs, William Frizzle and Warren Frizzle, are concluded by the deeds which they executed to Joel Patrick and Lewis Pugh, for the parcels of land on the north and south sides of the creek, for the express purpose of enabling them to erect a dam, and pond back the water in order to get a head of water sufficient to run a mill; so they cannot be heard to complain against their own deed. In regard to the flat, if there has (357) been a breach of contract on the part of the defendants, the remedy at law is adequate, and certainly a breach of contract, in that particular, is not a sufficient ground to induce a Court of Equity to interfere by its writ of injunction.

In the case of a private nuisance, the rule in this Court is, that the fact of nuisance should be established by an action at law before an injunction will issue, with certain exceptions as in *Clark v. Lawrence*, ante, 83, where an issue was ordered on the fact of nuisance or no nuisance. This comes within the general rule, and we can see no ground on which to make it an exception and direct an issue, unless the rule is to be disregarded altogether. They have been paid for the privilege of erecting a mill at the site set out in the proceeding, and are concluded in respect to a *private nuisance*. The other plaintiffs, Jesse Hart and Charles Rogers, show no particular interest in this matter, and must stand like any other citizens who are objecting to the erection of a public nuisance. In other words, they must file an information in the name of the Attorney-General, setting forth their reasons for believing that the defendant, Patrick, is about to commit a *public nuisance*, and making that the ground for asking the interference of this Court by its writ of injunction. Decretal order of the Court below reversed and injunction dissolved.

PER CURIAM.

Decree accordingly.

Cited: R. R. v. R. R., 88 N. C., 82.

FALLS v. DICKEY.

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ROBERT FALLS against JAMES DICKEY.

1. Where a plaintiff has a remedy at law on a covenant of quiet enjoyment, and brings a bill in equity against the covenantor on account of his non-residence in the State, it is necessary for him to aver also, that the defendant has no property or effects in this State, out of which satisfaction could be had upon his recovery at law.
2. Where such a suit is brought, and it appears that the plaintiff, in obtaining his deed and covenant, practiced to get an unfair advantage of the defendant, the court of equity will not grant him relief, but will leave him to his remedy at law.

CAUSE removed from the Court of Equity of CLEVELAND.

The bill alleges, that the plaintiff purchased a tract of land lying in the county of Gaston, and took a deed in fee for two hundred acres, for which he gave his notes for \$400; that said deed contained a covenant for quiet enjoyment of that estate; that about eighty acres of the best of this land was covered by the dower of widow Mrs. Mary Falls, and that he had utterly failed to get possession of that much of the land he had purchased; that the defendant is a citizen of the State of Arkansas. He states that he has been sued, at law, on the bonds given for the purchase-money, and that judgment has been obtained against him in the county court of Gaston, and execution threatened to be issued against him for the amount. The prayer is for an injunction.

The defendant, in his answer, says, that being about to remove to the State of Arkansas, he made a public vendue of the land in question, and his other property; that at the time this land was offered for sale, the crier distinctly made known that it was sold subject to the dower of Mrs. Falls; that the land was bid off by the plaintiff, but that no deed was then executed by him, but that he furnished him with the deed, which he, defendant, had taken when he bought the land, and desired him to have a deed prepared; that in the deed, thus furnished, the dower was excepted; that the plaintiff was a relation of Mrs. Falls, and lived near to her, and well knew that she had a dower in the said tract of land; that for fifteen years Mrs. Falls lived on this dower land, and was so living at the time of the sale; that shortly after this auction, the plaintiff came to where he lived, while he was loading his wagons to removed from the State, and when everything was in confusion around him, and presented him for execution, a deed, which he, plaintiff, had prepared, and told him that it was all correct and drawn according to the deed furnished him at the sale as a guide; that having confidence (359) in plaintiff's integrity, and being thus in confusion, he executed the deed, in question, which he now finds, to his surprise, is an absolute conveyance of the whole estate in the land, without any excep-

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tion of Mrs. Falls' dower, and in this he was grossly deceived and defrauded by the plaintiff.

The defendant further says, that the plaintiff had no occasion to go into a Court of Equity on account of his residence in another State, for that at the time of filing this bill, defendant had property, in this State, to the amount, at least, of \$5,000.

There was evidence taken in the cause, the material part of which, is alluded to by the Court and the cause was set down for hearing on the bill, answers, proofs and exhibits, and sent to this Court.

No counsel for the plaintiff.

Fowle, for the defendant.

BATTLE, J. We have no hesitation in denying to the plaintiff the relief which he seeks. It is clearly proved, that at the time he purchased the tract of land, mentioned in the pleadings, he had full knowledge of the incumbrance of which he complains, and we very much suspect, that when he prepared the deed for an absolute conveyance, he intended, if he could get the bargainor to execute it, to take an unfair advantage of him. His remarks made at various times, to different persons, show that he thought he had got a bargain of the defendant, and that he was determined to make the most of it. If the covenants contained in his deed can avail him at law, let him seek a remedy there. This Court will certainly not aid him in his intended sharp practice.

But independently of his failure upon the merits of his case, the plaintiff has not, by his own bill, shown himself entitled to relief in a court of equity. He has alleged, indeed, in his bill that the defendant is a resident of the State of Arkansas, but he has altogether omitted to aver that he had no property or effects in this State, out of which (360) to make good the damages which might be recovered in an action on the covenant for quiet enjoyment. This omission we deem fatal to his right to come into this Court for relief. See *Green v. Campbell*, 55 N. C., 477; *Richardson v. Williams*, 56 N. C., 116.

PER CURIAM.

Bill dismissed with costs.

SMITH *v.* MOREHEAD.

MARY ANN SMITH against JAMES T. MOREHEAD.

1. As a general rule, an objection to the jurisdiction of the court of equity may be taken on demurrer when the facts appear upon the record.
2. Impotency in a husband does not render a marriage by him void *ab initio*, but only voidable by sentence of separation, and until such sentence, it is deemed valid and subsisting.
3. The domicil of the husband draws to it the domicil of the wife; *therefore*, according to Rule 14, Sec. 3, Chap. 32, Rev. Code, where both parties are residing in this State, a bill, by the wife, for a divorce, for the cause of impotency, must be brought in the county where the husband resides.

CAUSE removed from the Court of Equity of WAKE.

The facts are sufficiently stated in the opinion of the Court.

Moore, for the plaintiff.*Graham*, for the defendant.

BATTLE, J. The plaintiff, in her bill, which was filed in the Court of Equity for the county of Wake, alleged that on 30 April, 1861, the marriage ceremony was performed in the city of Raleigh between her and the defendant, James T. Morehead; that she had been, ever since her birth, and was still, a resident of the city of Raleigh, in the county of

Wake, and the defendant was a resident of the county of Guilford; that after cohabiting with the defendant some two or three weeks, she found him to be, and she averred that he was, utterly and incurably impotent; that in consequence of such impotency, the pretended marriage between her and the defendant was null and void; and she prayed that it might, by a decree of the Court, be declared null and void; and further, that she might have a decree divorcing her from the bonds of matrimony.

The defendant demurred to the bill, for the want of jurisdiction in the Court of Equity for the county of Wake. The cause was set for hearing on the demurrer, and by consent was removed to the Supreme Court.

Our opinion being in favor of the defendant upon the question of jurisdiction, we have deemed it proper to state only the facts which are necessary to raise it.

That, as a general rule, an objection to the jurisdiction of the Court of Equity may be taken on a demurrer, when the facts appear upon the record, is settled. Indeed, it is said by Mr. Adams that want of jurisdiction is one of the most ordinary grounds of a demurrer in equity; Adams' Eq., 333. The principle of the defence by demurrer is, that on the plaintiff's own showing, his claim can not be supported, and that therefore it is needless for the defendant to answer the bill. If the

plaintiff show that the Court can not entertain jurisdiction of his cause, there seems to us as much reason for permitting the defendant to urge that objection, as to insist upon any other, which is disclosed by the facts stated in the bill. The plaintiff's counsel does not deny this; but insists that when the want of jurisdiction arises from the fact that the suit is brought in the wrong county, the objection can only be taken by a plea in abatement, under an express provision to that effect in the Revised Code, chapter 32, section 3, rule 14. The last clause of that rule does say, indeed, that if the suit be brought in any other county than is therein prescribed, it "may be abated on plea"; so it may, and so it must, if the fact that the suit is in the wrong county do not appear on the record; but if the objection appear in the bill itself, a plea is unnecessary, and a demurrer is proper to be used. It is well known that in (362) equity the statute of limitations is generally used as a defence by a plea, but it is now held that if, by the plaintiff's own showing, his equity is barred by the statute of limitation, no plea is necessary; see *Whitfield v. Hill*, 58 N. C., 321; *Robinson v. Lewis*, 45 N. C., 58.

We come now to the question whether the suit was brought in the wrong county, and the solution of that depends upon the enquiry whether a valid marriage was contracted by the performance of the marriage ceremony between the plaintiff and defendant, and if it were, what effect did it have upon the domicile of the parties. The counsel for the plaintiff contends that there was no marriage; that by reason of the defendant's impotency, the performance of the marriage ceremony between the parties had no legal effect, and that therefore what passed between them was a mere nullity. This, we think, is a great mistake. Impotency is a good cause for a divorce *a vinculo matrimonii*, but it does not, like the idiocy or lunacy in one or both parties, make the alleged marriage a nullity *ab initio*. Mr. Blackstone, after stating that marriage is regarded by the law as a civil contract, and that to be valid it must be between parties willing and able to contract, and who do contract in proper forms and solemnities, says that, in general, all persons are able to contract themselves in marriage unless they labor under some particular disabilities and incapacities. These disabilities are of two sorts; first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these, in our law, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are precontract, consanguinity or relation by blood and affinity, or relation by marriage, and some particular corporal infirmities; 1 Bla. Com., 434. After some other remarks about the nature of these disabilities, the great commentator adds: "But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are deemed valid to all civil purposes, unless such separation

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is actually made during the life of the parties." See, also, *Elliott* (363) v. *Gurr*, 2 Phil. Ec. Cases, 16; 1 Moore, 223; Noy, 29; Cro. Car., 352; 1 Roper on H. and W., 333. Among these disabilities it is seen that "some particular corporal infirmities" are mentioned. Thus, the impotency of the husband at the time of the marriage, to consummate it, and still continuing, is a good ground for annulling it; 2 Phil. Ec. Ca., 10. But until a sentence of divorce is obtained, the marriage is regarded as valid and subsisting. *Mr. Shelford* says expressly that "canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained, and for this he cites 2 Phil. Ecc. Cases, 19, 25." If this were not so, the triennial cohabitation required by the ecclesiastical courts (and which we presume our Courts would be bound to insist upon), before they will entertain a suit for divorce on account of impotency, would seem to be a strange requisition; see *Shelf. on Mar. and Div.*, 203 (33 Law Lib., 171).

The second kind of disabilities mentioned by Mr. Blackstone are what he calls civil, that is, such as are enforced by the municipal laws. Among these are incapacities of a former subsisting marriage, and that of a want of reason. These make the marriage absolutely null and void *ab initio*, and the pretended marriage may be so treated without any sentence pronounced by a court; though in the case of a want of reason in one of the parties when the marriage was contracted, the Court will entertain a suit for a nullity of the marriage. This was done in *Johnson v. Kincaid*, 37 N. C., 470, and *Crump v. Morgan*, 38 N. C., 91, referred to by plaintiff's counsel. In the former of these cases, the pretended husband was an idiot, and in the latter the wife was a lunatic at the time of the celebration of the marriage. In both cases, the alleged marriages were pronounced to have been nullities from the beginning, and the Court pronounced sentence, not of divorce, but of nullity. From what we have said it is clear that the performance of the marriage ceremony between the parties now before the Court made them, to all (364) intents and purposes, man and wife, and they must so remain until death or a divorce shall separate them.

This being so, the only remaining enquiry is, what effect the marriage had upon the domicile of the parties. Upon this question we think the law is well settled; in *Warrender v. Warrender*, 9 Bligh., 89, before the House of Lords, it was laid down in the strongest terms that the domicile of the husband drew to it, in law, that of the wife. That was the case of a suit for a divorce, and it was followed by another suit of the same kind, before the Consistory Court of London, in which Dr. Lushington held the same doctrine, 22 Curtis' 35, (7 Eng. Ecc., 139). It is unnecessary to multiply authorities upon this point, for the general

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rule seems to have been assumed to be as we now state it in the very case of *Schonwald v. Schonwald*, 55 N. C., 367, relied upon by plaintiff's counsel to disprove it. In that case we decided, indeed, that upon the construction of the seventh section of thirty-ninth chapter of Revised Code, a wife residing in another State could not be considered as a resident of this State, for the purpose of suing her husband for a divorce in our Courts. The language of the act upon which the construction was placed is as follows: "Nor shall any person be entitled to sue, unless he or she shall have resided within the State three years *immediately* preceding the exhibition of the petition." It was undoubtedly competent for the Legislature to enact that the actual residence of the wife out of the State should not be considered as a legal residence with her husband in the State, for the purpose of enabling her to sue him in the Courts of this State. That was the intent of the Legislature in the act to which reference is made, and the effect of the decision of *Schonwald v. Schonwald* is to carry out that intent. In other respects, the rule remains unchanged, and where the parties reside in the State, the residence of the husband still remains the residence of the wife.

It follows that as soon as the parties in this case were married, the plaintiff became, in law, a resident of the county of Guilford, and according to the fourteenth rule of the third section of the thirty-second chapter of the Revised Code, her suit ought to have been (365) instituted in the Court of Equity of that county.

The demurrer to the bill, for the want of jurisdiction in the Court of Equity of Wake, is sustained, and the bill

PER CURIAM.

Dismissed.

Cited: Hicks v. Skinner, 71 N. C., 543, 555; *Moore v. Moore*, 130 N. C., 335, 339; *Oldham v. Rieger*, 145 N. C., 258; *Cook v. Cook*, 159 N. C., 52; *Walters v. Walters*, 168 N. C., 414.

GEORGE W. MORDECAI against WILLIAM M. BOYLAN and others.

1. Where a testator, having estates in this and two other States, appointed an executor here and another residing in one of the other States, and provided that they should not be required to give security, and it appeared that the money in the hands of the executor, in this State, was not sufficient to pay the pecuniary legacies, it was *Held*, to be the intention of the testator that such executor was not required to prove the will abroad and collect money in the other States to pay the legacies in full, and that he must pay the money in his hands to the legatees *pro rata*, and that the testator intended the executor abroad to administer the assets there.

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2. Where the legatees were children and grandchildren of testator's wife, and the assets, out of which the pecuniary legacies were to be paid, were bearing interest, it was *Held*, that such legacies were entitled to draw interest from the testator's death.
3. *Grandchildren and great-grandchildren* cannot be included in the division of a residue directed to be made among *children*.
4. The act of 1860, chap. 37, preventing the emancipation of slaves by will, applies to the case of a will made before its passage, where a testator died subsequently thereto.
5. By the act of 1860, chap. 37, slaves, attempted to be emancipated by will, go to the next of kin, and not to the residuary legatee.
6. Where a testator, in a codicil, gave as a reason for a legacy to a grandson, that *he had disinherited such grandson*, but the fact was, that he had not disinherited him, but had given him a large legacy in a clause of his will, it was *Held*, that the bequest, in the will, was not revoked by that of the codicil, but that the latter, itself, was void on account of the mistake; and,
7. *Held further*, that parol evidence, as to testator's feelings towards the legatee, was admissible, in the question of fact, as to the mistake.

(366) THIS cause was sent up from the Court of Equity of WAKE by consent.

The facts of the case are sufficiently stated in the opinion of the Court, filed by *Judge Battle* in this Court.

Moore, for the executor.

Graham, for Catharine Boylan.

K. P. and R. H. Battle, for the residuary legatees.

G. W. Haywood, for W. M. Boylan.

Winston, Sr., and *Fowle*, for J. S. Boylan.

BATTLE, J. The bill is filed for the purpose of obtaining the advice and directions of the Court as to how the plaintiff shall act in certain matters of difficulty, which have arisen in executing the will of his testator, the late William Boylan.

1. It appears from the will that the plaintiff and three other gentlemen, all of whom are residents of this State, and Henry Vaughan, of the State of Mississippi, are appointed executors, and it is provided that no security shall be required of them, and that they shall not be liable for the acts, negligences and omissions of each other. The plaintiff alone has qualified as executor in this State, and it is understood that Henry Vaughan has qualified as such in the State of Mississippi. The testator left a large estate of both real and personal property, consisting of lands, slaves and live stock, situate in both of the above named States—large amounts of bank and railroad stocks in this State, and also a large amount of bonds, notes and other evidences of debt due from persons residing in this State and the States of Louisiana and Mississippi. The pecuniary legacies given in the will amount to about the aggregate sum of \$125,000, and the legatees, who are numerous, reside some in this

State and others out of it. The executor in this State will not have assets in his hands sufficient to satisfy all the pecuniary legacies, without collecting the mounts due from debtors residing abroad, and he desires the instruction of the Court as to whether it is his duty to prove the will and take out letters testamentary in any other than this State, for the purpose of collecting the debts which may be due (367) from debtors residing there.

Our opinion is, that he is not. The testator has settled that question himself by appointing an executor residing abroad; for such executor must be supposed to have been nominated for the express purpose of attending to the collection of debts due there. And it aids this supposition that we find the executors excused from all responsibility for the acts, negligences and omissions of each other.

2. The second inquiry is whether, if the plaintiff can not collect money enough to pay off all the pecuniary legacies, he must pay out what he has *pro rata* among all the legatees, or may he select and pay whomsoever he pleases.

We can not discover anything in the will which gives one legatee any preference over another. All have equal claims upon the executor, and in case of a deficiency of assets in his hands, he must scale the legatees *pro rata*.

3. Interest in this case is, we think, to be calculated on all the pecuniary legacies, from the testator's death. All the legatees are his wife's children, grandchildren and a great-grandchild, and the assets, or nearly all the assets, out of which they are to be paid consists of debts due the estate, which are bearing interest; see *Williams v. Falcon*, *ante*, 235.

4. The testator clearly shows by his will that he understood the distinction between children and grandchildren. The general rule, therefore, must prevail, that in the division of the residue, directed to be made among his children, the testator's grandchildren and great-grandchild can not be included; *Ward v. Sutton*, 40 N. C., 421.

5. Laws 1860, chapter 37 (see Laws 1860, first session), forbids the emancipation of David Matthews, his wife and daughter Adelaide. The will was made before the passage of the act, but the testator did not die until after that time. The act declares that no slaves shall hereafter be emancipated by will, deed, or any other writing which is not to take effect in the lifetime of the owner. The object of the law being to prevent the emancipation of slaves by will, or any other instrument which is to operate in the nature of a will, (368) we can see no reason why it may not operate upon a will made before its passage, where the testator dies afterwards, as well as one made subsequent to the time of the enactment. In this respect, it differs from a statute made for the purpose of changing the construction

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of a will, such as the Act of 1844, chapter 88 (see Rev. Code, ch. 119, sec. 6), which declared that a will should be construed to speak, with respect to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator. Such a statute shall not operate upon a will made before its passage, because the testator, when he made it, is supposed to have used language with reference to that law as it then stood, and the Legislature will not give to such language a different meaning. This seems to have been the ground upon which *Battle v. Speight*, 31 N. C., 288, was decided. It is manifest that the principle of the decision does not apply to the present case.

6. The executor asks what is to be done with the slaves in case they can not be emancipated. The act itself answers the question. It says, expressly, that they shall go to the next of kin, and shall not pass under any residuary clause of the will.

7. The most difficult enquiry propounded by the executor is that which relates to the devise and bequests, in trust, for the testator's grandson, John S. Boylan, contained in the eighth clause of the will, taken in connection with the bequest, in trust, for him to be found in the first codicil. The gift in the will is to the testator's daughter Catharine, of one-half of a tract of land in the State of Mississippi, many slaves, and ten thousand dollars in money, in trust for the said grandson during his life, with certain limitations over. The codicil is as follows: "I hereby revoke so much of my will as disinherits my grandson, John S. Boylan, and do hereby give and bequeath to my son John H. Boylan, ten thousand dollars, in trust for my said grandson, John S. Boylan, the interest to be paid to him annually during his life," with a limitation to his children, should he leave any, and if not, then to fall into the residue (369) of the estate. John S. Boylan claims under both the will and the codicil, while the other devisees and legatees contend that the bequest in the codicil is a substitution for what is given in the will, or that at all events it can not be cumulative.

This question has been argued with much zeal and ability by the counsel on both sides, and after much reflection and some hesitation, we have come to the conclusion that the bequest in the codicil is not a revocation of the devise and legacy given in the will, but is itself void as having been made under an entire mistake of facts. In coming to this conclusion, we have felt ourselves at liberty to take into consideration the parol testimony, so far as it tends to show the state of the testator's family, the condition of his estate, and his feelings towards his grandson, J. S. Boylan, at the time when the will and codicil were respectively executed; see *Bivens v. Phifer*, 47 N. C., 436. The will bears date 18 June, 1858, while the codicil appears to have been made on 2 July, 1860. In the interval between those dates, the grandson, John

S. Boylan, had, by his evil and dissipated conduct, so seriously incurred the displeasure of his grandfather that he declared his intention to disinherit him. The counsel for John S. Boylan contends that the devise and bequest in the will is not revoked by the codicil, because, though it may appear that the testator intended, at one time, to revoke the gift to his grandson, and thereby disinherit him, yet such intention had never been carried out in any manner recognized by the law as sufficient for that purpose. He then insists that the legacy in the codicil is a plain bequest of the sum therein mentioned, and there is nothing to prevent its taking effect. On the other hand, the counsel for the other defendants argue that the codicil shows a plain intention in the testator to disinherit his grandson, and the great rule which governs in the construction of wills, to wit, that the intent must prevail, no matter in what language it may be expressed, requires the Court to give full effect to it. In support of this argument, besides the other cases, *Postmaster-General v. Early*, 17 Curtis, 86, decided by the Supreme (370) Court of the United States, was referred to, wherein it was held that an act of Congress which gave jurisdiction to a certain Court over certain subjects, concurrent with another Court, thereby conferred a jurisdiction upon the latter Court, which it had never had before. That may be so, but the cases are not parallel. If a testator were, by a codicil, to bequeath to A a thousand dollars, that being the sum which he had by his will given to his brother B, then B might claim a legacy of that sum, though it had not been given to him in the will. The language here supposed would be very much like that in the case cited by the counsel. But the words of the codicil in the case now before us are very different. The testator says, "I revoke so much of my will as disinherits my grandson, John S. Boylan," and we do not see how this can mean the direct reverse of the plain import of the language. If a previous codicil had been found, in which the testator had disinherited his grandson, a revocation of that by a second codicil must have had the effect to restore the gift of the real and personal estate contained in the will. We are of opinion, then, that the devise and bequest in the will must stand, but are satisfied that the testator labored under a mistake of fact in supposing that he had disinherited his grandson, and that the legacy given by the codicil was the consequence of that mistake; considering the state of alienated feelings in which the parties stood towards each other at the time, and the cause which had produced it, we can not for a moment suppose that the testator intended to give his grandson an additional legacy. That legacies given under a false impression as to the existence or non-existence of a fact will be null and void, is shown by many cases; see *Wms. on Ex'rs*, 141, *et seq.*

PER CURIAM.

Decree accordingly.

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PEARSON, C. J. I concur in the opinion filed by Judge Battle, with the exception of that part in reference to the \$10,000 given by the (371) codicil to John H. Boylan, in trust for John S. Boylan. I am of opinion that, according to the rules of construction adopted by the Court, see *Millsaps v. McLean* (at this term), 60 N. C., 80, wills must be construed by what a testator does, and not what we suppose he intended to do. But, as Judge Battle is clear in his opinion that the language in the codicil does not take effect, and as Judge Manly, who heard the argument, is of the same opinion, I do not insist on my opinion so far as to dissent; particularly, as the matter will not be made a precedent; for no other case of the kind will, in all human probability, occur again, and I am satisfied the conclusion of Judge Battle and Judge Manly is more in accordance with the actual intention of the testator than that to which I have come by a consideration of the will and codicil and such evidence as the Court is allowed to hear.

Cited: Boylan v. Boylan, 62 N. C., 160; *Hayley v. Hayley*, *Ib.*, 187; *Lee v. Baird*, 132 N. C., 760; *Thompson v. Batts*, 168 N. C., 531.

Dist.: Powell v. Morisey, 98 N. C., 430.

JOHN P. COOK and another against JOHN F. ELLINGTON, Adm'r.

Whether the word "wish," in a will, was intended to create a trust, discussed. This case was decided upon the peculiar phraseology of the will.

CAUSE removed from the Court of Equity of WAKE.

Joseph F. Cook, in March, 1862, by his last will and testament, bequeathed and devised as follows: "Fourthly, I give and bequeath to my beloved wife, Tranquilla Cook, the following property and money: First, I give her all my negroes and their increase, few or many, and all the money I may have at my death, and also all that may be due me on bonds and notes, and my wish is that at her death she will give the one-half of all I give her, and the increase of my negroes, to my brother, John P. Cook, and Mary A. Terrill.

"Fifth. I lend to my said wife, Tranquilla Cook, during her lifetime, all of my lands, containing eighteen hundred and ninety- (372) one acres, more or less, and at her death I give said land to my brother, John P. Cook.

"Sixth. I give all my stock of horses, mules, cattle, hogs, sheep, corn, fodder, wheat and oats that I may have at the time of my death, to my said wife, Tranquilla Cook; also, my household and kitchen furniture, farming tools, carriage, blacksmith's tools, wagons and carts."

On the next day he added to his said will this codicil: "I desire that

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my wife, Tranquilla Cook, shall have all the crop of cotton that I may have on hand at the time of my death, and also I desire that the increase of the slaves, mentioned in the fourth clause of the above will and testament, shall be construed to mean one-half of the increase as well as the other property named in the said clause of said will and testament, which I wish my wife, Tranquilla Cook, to give to my brother, John P. Cook, and my sister, Mary A. Terrill, and I have to this codicil, which I wish to be taken and construed as a part of my will, set my hand," etc. The executor named in the said will having renounced the trust, the defendant, Ellington, was appointed administrator, with the will annexed, and Mrs. Tranquilla Cook, having lately died intestate, the defendant also administered on her estate, and took into his possession the whole of the property lately in her possession, including the whole of that embraced in the fourth clause of the said will.

This bill was filed against him, praying for a decree that he may be declared a trustee for the plaintiffs of one-half of the property and one-half of the increase mentioned in the said fourth clause of the said will, and that he account and pay over to them their said share. To this bill the defendant demurred, and the cause was set down for argument on the demurrer and sent to this Court by consent.

Moore, for the plaintiffs.

K. P. Battle and *R. H. Battle, Jr.*, for defendant.

PEARSON, C. J. In cases of this kind, very little aid is to be (373) derived from "the books," except in regard to the general principles which have been established, for all depends upon intention, and no two wills are ever precisely alike; although the meaning may be the same, there will be a difference in the words used, and a difference in the relations of the members of the family, or other circumstances having a material bearing on the question.

This case fulfills in as complete a manner as any case can do, all the conditions required by the general principles which have been established. If a trust is not created in this case, the whole doctrine must be ignored. In support of this position, I refer to *Ford v. Fowler*, 3 Beame, 146; see also *Alston v. Lea*, ante, 27. That is considered as a case decided on two principles, where, as was remarked by *Mr. Moore* with much force and beauty, "the pendulum which had been vibrating first on one extreme and then on the other, had gradually assumed its right position."

In this case, the subject matter of the trust is certain; the objects of the testator's bounty are plainly described, and *his wish* that one-half of the property embraced in that clause of the will should be given to John P. Cook and Mary A. Terrill by his widow at her death, is as plainly

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expressed as can be done by the English language. Here, then, we have certainty as to the subject matter, certainty as to the objects of the bounty, and certainty as to the intention of the testator; for *the wish* is expressed directly and unequivocally; nothing is left to conjecture; so, to use a common expression, "there can be no two ways about it." The husband did intend and *wish* and express that intention and wish in his last will and testament, that his wife, at her death, should give one-half of the negroes and other property given to her by the fourth clause of the will to his brother and sister. The wish of her husband, so clearly expressed, imposes an obligation on *her conscience*—in other words, creates a trust which a court of equity will enforce.

The general frame of the will tends to confirm the correctness of this conclusion. The testator divides his property into three (374) classes, although he gives all of it to his widow. 1. His land he gives to her for life, with a remainder at her death to his brother John. 2. His perishable property he gives to her absolutely. 3. His negroes and bonds, etc., he gives to her subject to a *wish* that at her death she will give one-half thereof to his brother John and sister Mary, showing clearly that he intended the negroes and bonds to be in a middle state, not given for life, and still not given absolutely, but given *subject to a trust*, in favor of his brother and sister, as to one-half, after her death, in respect to which nothing was left to her discretion, or her inclinations, or her wishes; which disposition he evidently makes under the impression that, by having the *legal* estate subject to a trust, her control of the negroes, in respect to the disposal of such as she chose to sell, and in respect to the division in regard to giving them in families, would be less restricted than if he had given her only a life estate, with remainder as to one-half to his brother and sister.

But all doubt as to his intention is removed by the codicil. By it he gives the crop of cotton on hand at his death absolutely to his wife, classing it with the horses, mules, etc., and he then takes particular pains to remove a difficulty which he supposes might arise as to the increase of the negroes, and says he does not mean that his wife shall give all of the increase of the negroes to his brother and sister, but only the one-half of the increase of the negroes; treating it not as a matter left to her discretion or inclination, but as the subject of a trust which he had created in favor of his brother and sister, and which, consequently, he chose to relieve from all doubt and obscurity. His particularity in thus explaining his true meaning relieves the subject of all doubt, and makes this much stronger than any case to which we have been referred in the books.

PER CURIAM.

Demurrer overruled.

Cited: Young v. Young, 68 N. C., 315.

McLAURIN v. FAIRLY.

(375)

DANIEL McLAURIN and others against JOHN FAIRLY and wife.

1. A limitation by deed "to her and *her representatives*," can only mean to her executors and administrators.
2. Where a bill set forth that certain slaves were sold at auction by an administratrix, and a bill of sale made to B, the purchaser, but it was agreed that he should hold the property, in trust, to indemnify himself against certain debts, in which he was surety for the intestate, and he paid no money; that the debts remained unpaid for nine years, and that in the meantime B married the administratrix, and took with her the slaves in question, it was *Held*, that these allegations were sufficient to make out a case against B as succeeding to the trust his wife was under to distribute, and having the legal estate by the bill of sale, the property could be followed in his hands, and *Held further*, that the statute of limitations did not run against the distributees.

CAUSE removed from the Court of Equity of RICHMOND.

Lauchlin McLaurin, the father of the plaintiff, was indebted to James Patterson in the sum of \$700, and to J. C. McEachin in \$1,400, for which he gave his notes with the defendant and his brother, J. C. McLaurin, as his sureties; said Lauchlin died intestate in the year 1843, and his widow, the defendant Nancy (now) Fairly, the mother of the plaintiffs, administered on his estate. After their father's death a new note was given to Patterson, with defendant John Fairly as principal, and John C. McLaurin and defendant Nancy as his sureties, and to McEachin with defendant Nancy as principal, and John Fairly and J. C. McLaurin as sureties. An order of Court was obtained by the administratrix to sell the slaves belonging to the estate for the payment of the debts, and an agreement was entered into between plaintiffs' mother, the administratrix, and said Fairly, that he should bid off the slaves for the benefit of the widow and children of the said Lauchlin, and should hold them, as plaintiffs say, to indemnify himself for and on account of his liabilities in the two notes aforesaid, and after these were paid off, he would reconvey the said slaves to the widow and children of the said Lauchlin. He did bid off the slaves, six in number, for the sum of \$1,459, and having received a bill of sale from the administratrix, he at the same time executed a deed as follows: "Whereas, I did, on 12 February, 1844, receive from Nancy McLaurin, administratrix of Lauchlin McLaurin, deceased, the following negroes (naming them), for the sum of \$1,459; now, if the said Nancy, or her representatives, shall pay two certain notes, one due James Patterson, where I am maker, and J. C. McLaurin and Nancy McLaurin surety; the other note payable to James C. McEachin, Nancy McLaurin maker, and J. C. McLaurin and myself securities, with all interest, costs and damages that may be accumulated on said notes, I, the said John Fairly, bind myself, my heirs and assigns, to make to her, or her representa-

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tives, a title to the above mentioned negroes." Fairly paid no money on the executing of the bill of sale to him, and did not take the slaves into his possession, but left them with the said Nancy until he married her, the said Nancy, in 1852, when she, with the slaves, removed to his house, where they have been ever since. The bill alleges that these two notes were not paid off by the defendant Fairly until after he married the widow in 1852, to wit, in 1853, and that at this time the slaves had increased to the number of fourteen, and were worth three times as much as the defendant paid on the two notes, which was \$3,200.

When the said notes were paid off, none of the plaintiffs were of age; the plaintiff Daniel arrived at full age April, 1853, Mary Ann in 1858, and the other two plaintiffs, Catharine and Margaret, are still under age. They aver that they never were informed by the defendant John, or their mother, the other defendant, that Fairly intended to insist on an absolute estate in said slaves until a few weeks before this bill was filed. The prayer is for a distribution of the slaves and an account of hires, etc.

The answer of defendant John Fairly says that at the time he bid off the slaves in question, there was no contract between him and the administratrix as to bidding them off in trust for her and her children, but that, knowing his liability on the two notes, and being the only responsible person, he run up the property to make it bring its utmost value, and that he thinks it did bring its full value; that after (377) the sale, for the ease and accommodation of the family, he entered into the deed set out in the plaintiffs' bill. He admits that he paid no money at the time of the execution of the bill of sale, but he says he interposed with his credit and procured for the estate a long indulgence, which it otherwise could not have obtained; that afterwards, having been urged by the creditors, he paid the debts, and then considered the negroes his. He also relies upon the statute of limitations.

There was replication and proofs, and the cause being set down for hearing, was sent to this Court.

Strange and Buxton, for the plaintiffs.

Ashe and Shepherd, for the defendants.

PEARSON, C. J. The words, "her representatives," in the deed executed by the defendant Fairly to Nancy McLaurin, the other defendant (now his wife), dated 12 February, 1844, can not be made to mean *her children*, and can have no other meaning than "her executors or administrators." It is true, by this construction, the words have no legal effect, and must be treated as surplusage. So that the deed will operate precisely as if these words had not been inserted, but the Court is bound

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by the words used in the instrument, and can not substitute other words, although it may be highly probable that the latter would express the actual intention of the parties; for the province of the Court is to construe the deed made by the parties, and not to make a deed for them. From the relation of Mrs. Fairly to the plaintiffs, and her duty to them as distributees of the intestate, it is probable, nay, almost certain, that her intention would have been expressed by these words: "Now, if the said Nancy McLaurin, or *those she represents*, shall pay two certain notes," etc.; but the words used are "her representatives," and the former can not be substituted in their stead. Where the words used are susceptible of two meanings, and from the relation of the parties—the object in view, and other matters which the Court is at liberty to call to its aid in the construction of instruments, the sense in which the parties intended to use the words is shown, the (378) Court will adopt the construction which will give effect to the intention, although it may not be the most obvious one, or that which, apart from the intention, would have naturally suggested itself; indeed, so solicitous are the Courts to carry out the intention whenever the words used will allow it, that in many instances sentences will be transposed, rules of grammar violated, and the ordinary import of words departed from; many illustrations will suggest themselves to every one familiar with "the books." This will occur to anyone who has read Blackstone; A makes a feoffment to B, for life. Who's life? It may be for the life of A or B; the ordinary construction is that it is for the life of B, as it is most beneficial to him, and deeds are to be taken most strongly against the maker, but if it appear by the deed itself, or by the conveyance under which he derives title, that A had only an estate for his own life, then B will take an estate for the life of A, for otherwise the conveyance would be wrongful, and the estate would be forfeited, if A should make a different estate from that which he holds, hence there is a presumption that the intention was to make an estate for the life of A, and the Court will adopt that construction. If the feoffment had been to B for his *own life*, there would have been no room for construction; on the same principle, in our case, there is no room for construction.

There is, however, another view of the case made by the allegations of the bill, on which the plaintiffs are entitled to a decree: *i. e.*, as administratrix, Mrs. McLaurin held the slaves in trust for herself and her children, the distributees of her intestate, subject to the payment of debts; by the arrangement which she made with the defendant Fairly, for the purpose of indemnifying him as security on the two notes, and saving to her the right to redeem the slaves, which was carried into effect by offering them for sale, and Fairly bidding them off and taking a

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bill of sale, *without paying any consideration*, and executing the deed to Mrs. McLaurin, the legal title vested in Fairly, but he took (379) subject to the same trusts that attached to the property in the hands of Mrs. McLaurin, of which he had full notice, as appears on the face of the deed; consequently, the *cestuis que trustent* have a right to follow the fund in his hands, and convert him into a trustee, subject only to his right to be indemnified as the surety of their father, which they offer to do. The suggestion that this arrangement was made between Fairly and Mrs. McLaurin with an intent to defraud the other creditors of her intestate, and therefore a court of equity ought not to carry it out, comes with an ill grace from them, and is no bar to the equity of the plaintiffs, because there is no proof of any debt of the intestate remaining unsatisfied, and there is no ground on which the plaintiffs can lose their equitable interest because of a supposed fraud on the part of their trustee in which they did not participate.

There is no bar by the statute of limitations or lapse of time. No time is fixed for the payment of the two notes; Fairly married the trustee, whose duty it was to act for and take care of the interests of the plaintiffs before he paid the notes, to say nothing of the fact that all of the infants were under the disability of infancy at the first of the transaction, and some of them remain so still.

The plaintiffs are entitled to partition, and for an account of the hires, subject to the expenses and other proper allowances.

PER CURIAM.

Decree accordingly.

(380)

JONATHAN WORTH, Adm'r, against ALEX. GRAY and others.

Where certain matters have been set forth in the answer, by the way of plea, and there has been replication to the answer, it is too late to except to the answer for insufficiency.

APPEAL from the Court of Equity of RANDOLPH.

The plaintiff excepted to the defendants' answer an account of insufficiency. The exceptions were overruled, and plaintiff appealed to this Court.

Graham, for the plaintiff.

Morehead, for the defendants.

PEARSON, C. J. If replication be taken to a plea in a suit in equity, the sufficiency of the plea, in respect to the law, is admitted. To take issue on the matters of law presented by a plea, it should be *set down for argument*. In this case, the plaintiff having taken replication,

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the only matter open is the truth of the allegations of the plea. It follows that no exception can be sustained in respect to those parts of the bill which are covered by the plea.

We have considered the exceptions in respect to the other parts of the bill, and are of opinion that the answer is sufficiently responsive, and as full as could be expected or required in regard to transactions of such long standing. The irregularity of filing two answers, we think, is fully explained. The first answer is incorporated as a part of the second, and the plaintiff may have the benefit of both.

PER CURIAM.

Affirmed.

(381)

JOSHUA HACKNEY against CHARLES GRIFFIN, Adm'r.*

1. A testator, in contemplation of a certain contingency, provided that, there-upon an estate, consisting of realty and personalty, should be divided into four parts, and distributed as follows, "One each to a brother and a sister, and their heirs"; "One part to my other lawful heirs, and the fourth part to foreign missions, to be paid over to the treasurer of that board, to be appropriated to that purpose." By another clause, he provided that, "If there should be any property, either real or personal, not given away heretofore, it is to be equally divided between all my lawful heirs."
2. The brother and sister survived the testator, but died before the happening of the event contemplated. Upon the happening of that event:
3. *Held*, that the two shares, first mentioned, descended—the realty to the *heirs*, and the personalty to the *personal representatives* of the brother and sister respectively.
4. That the third share belonged to such as were heirs of the testator *as to realty*, excluding the heirs of the brother and sister first mentioned.
5. That the share devised to foreign missions, having lapsed on account of the ambiguity of the clause which contained it, fell into the residue, and descended upon all those who were heirs of the testator *as to realty*.

CAUSE removed from the Court of Equity of CHATHAM.

This bill was brought for a partition of real and personal estate, of which the plaintiffs allege they, with the defendants, were jointly seized under the will of Joshua Williams, of which the following is the material clause:

"3d. I give unto my beloved daughter, Sarah Ann E. Williams, all the residue of my property, both real and personal (not given to my wife), to have and to hold to her and her heirs forever. Nevertheless, if my daughter should die leaving no legal heirs of her body, then and in that case my will is that her estate, both real and personal, shall be divided into four parts. One-fourth part to my beloved sister Elizabeth Hackney, and her heirs forever. One-fourth part to my beloved brother,

*This cause was decided at a former term, but was not reported at the time on account of a mistake in the facts, which required a rehearing.

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Anderson Williams, and his heirs forever. One-fourth part to my other lawful heirs. One-fourth part to foreign missions, to be paid over to the treasurer of that board, to be appropriated to that purpose. If there should be any property, either real or personal, not given (382) away heretofore in this will, it is then to be equally divided between all my legal heirs."

The will was dated and the testator died in 1848.

Sarah Ann E. Williams died in July, 1851, without issue, and Sims Upchurch administered on her estate.

Anderson Williams having survived the testator, died in the lifetime of Sarah Ann E. Williams and John Hackney, his administrator and his children are plaintiffs. Elizabeth Hackney survived the testator, but died in the lifetime of said Sarah Ann E. Williams. Her administrator and children and grandchildren are plaintiffs.

Besides the sister and brother mentioned in the will, Joshua Williams left two sisters, Dolly Bynum and Dorcas Neville, and a brother, Nimrod Williams, who are plaintiffs. He had also two brothers, Joseph and Henry, and a sister, Sarah, who died in his lifetime, and whose children are plaintiffs. The children and grandchildren of the brothers and sisters deceased being his sole heirs at law, claim to have divided among them so much of his real and personal estate as is named in the third article of the said will. The children of brothers and sisters, together with the widow of the testator, claim to be entitled, under the expressions "lawful heirs" and "legal heirs," to whatever of the personal estate of the deceased is contained in the said article, and that they are also entitled to so much of the property as was intended to be conveyed to foreign missions.

Phillips, for the plaintiffs.

Manly, for the defendant.

PEARSON, C. J. Joshua Williams died in 1848, leaving a will by which, after providing for his wife, he gives to his daughter, Ann (who was their only child), all the residue of his property, both *real* and *personal*; but if she should die leaving no child living at her death, "then her estate, both real and personal, to be divided into four parts. (383) I give one part to my sister, Elizabeth Hackney, and her heirs forever; one part to my brother Anderson, and his heirs forever; one part to my *other* lawful heirs, and the *other fourth part to foreign missions, to be paid over to the treasurer of that board, to be appropriated to that purpose.*" "If there should be any property, either real or personal, not given away heretofore, it is to be equally divided between *all* my legal heirs."

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Anne, the only child of the testator, died intestate, and without leaving a child, in the year 1851. Elizabeth Hackney and Anderson Williams outlived the testator, but died before his daughter *Anne*. Dolly Bynum, Dorcas Neville and Nimrod Williams are the sisters and brother of the testator, and the several other plaintiffs and defendants are the children of deceased brothers and sisters who died in his lifetime.

Elizabeth Hackney and Anderson Williams were each entitled to one-fourth of the real and personal property given to *Anne*, upon the contingency of her death "without leaving legal heirs of her body."

It is settled that when the person is known, but the event is uncertain, a contingent remainder, conditional limitation or executory devise is transmissible by descent and such an interest in personal property passes by succession to the personal representative. (*See Fearne.*) So, although Elizabeth Hackney and Anderson Williams died before the contingency happened, the interest of each, respectively, in the real estate was transmitted by descent to their heirs, and their interest in the personal estate passed to their respective personal representatives.

One other fourth part of the real and personal estate is given to the testator's "*other lawful heirs.*"

When used in a limitation over of personal estate, the word "heirs," unexplained and standing by itself, is held to mean "distributees," or the persons entitled under the statute of distributions; but where a fund, composed of both real and personal estate, is given over to the testator's "heirs," and it is apparent that he intends the same persons to take both estates, it is settled that inasmuch as by force (384) of the word "heirs," in its appropriate and technical sense, the heir at law is entitled to the real estate, he is also entitled to the personal estate, because of the intention that both should go together; 2 Jarman on Wills, 22, 23, and notes; 4 Kent, 537, note; *Gwyn v. Murdock*, 14 Vesey, 488; *McCabe v. Spruill*, 16 N. C., 189. It follows that this fourth part, both of the personal and real estate, upon the death of the testator's daughter, vested in those persons who were then his heirs at law, to wit, his sisters and brother, and the children of his deceased brothers and sisters, who bring themselves up by the right of representation, and take the shares their parents, if alive, would have taken. But inasmuch as by the word "other," in direct reference to Elizabeth Hackney and Anderson Williams, the testator expresses his intention that they (to each of whom he had given one-fourth part) should be excluded from this fourth part, it follows that their children, who can only bring themselves up to an equality with their aunts and uncle by representing their parents, have no right to any part of this fourth.

The other fourth part of the real and personal estate is given over to "foreign missions, to be paid to the treasurer of that board, and to be

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appropriated to that purpose." It is conceded that these words are too vague and uncertain to vest any interest in any person or corporation. So this fourth part falls into the residuum, and passes to the "legal heirs" of the testator. The persons entitled to take under the word heirs have been already indicated. There being no word of exclusion, the children of Elizabeth Hackney and of Anderson Williams represent their parents, and take a share of this fourth part. It is settled that the effect of the word "equally" is to require the distribution to be made per capita; *Freeman v. Knight*, 37 N. C., 76, and, as is said in that case, "whatever might be thought of these distinctions were the matter now a new one, to disregard them at this day would be *quieta movere*."

PER CURIAM.

Decree accordingly.

Cited: Clark v. Cox, 115 N. C., 98.

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ABATEMENT—PLEA IN.

Vide Jurisdiction, 4, 5.

ABATEMENT OF LEGACIES.

Vide Specific Charge, etc., 2, 3.

ACCOUNT—BAR TO.

Vide Settlement, etc.

ADEMPMENT OF A LEGACY.

1. The general rule is, that where a testator, after making his will, sells the property given, the legacy is adeemed. But where the *proceeds* of the sale of property are given to children, and the will intimates that the sale is to be made by the testator himself, who does make it, and no substitution or equivalent is made for such legacy, and the proceeds are reinvested, and are traceable, it was *Held*, not to be a case of the ademption of the legacy by sale of the property. *Nooe v. Vannoy*, 185.
2. Where an intended legacy of a tract of land was sold by the testator, and a bond given by him to make title, which, however, was not done in his lifetime, it was *Held*, that the intended legatee had no claim upon the proceeds of a note taken by the testator for the purchase money of the land. *Chambers v. Kerns*, 280.

ADMINISTRATOR.

Vide Following Money, 2.

ADMINISTRATOR DURANTE MINORITATE.

An administrator *durante minoritate* is liable for a *devastavit* to the executor, who qualifies after coming of age, and if such executor abstain for ten years from bringing suit, his cause of action is presumed to have been satisfied, released, or abandoned. So that persons having a contingent interest in remainder, which is injured by such *devastavit*, must look to the executor and not to the administrator *durante minoritate*, or the sureties on his administration bond. *Herndon v. Pratt*, 327.

AGENT—COMPENSATION TO.

Where one, on the footing of a friend, neighbor and relative, undertook to manage the moneyed affairs of an old lady, without any stipulation as to compensation, and without intending to make any charge, it was *Held*, that he was not entitled, after her death, to claim a remuneration for his services, and that his being held to a strict account by her administrator did not vary the case. *Hill v. Williams*, 242.

ALIMONY.

There are circumstances under which the striking of his wife with a horse-whip, or switch, by a husband, and inflicting bruises, would not be the ground of a divorce. Where, therefore, such violence was made the ground of an application for a divorce, it was *Held*, to be necessary that the bill, or petition, should set forth *particularly and specially*, what she did and said immediately prior to and during such use of force. *Joyner v. Joyner*, 322.

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ALTERNATIVE RELIEF.

Where an obligee in a bond to make title, files a bill for a specific performance of the contract, and claims to have the land conveyed according to certain boundaries which he alleges were meant by the contract, and the defendant in his answer denies that such boundaries were meant, and sets out others which he alleges were intended, the plaintiff, not having in the pleadings averred his willingness to accept a deed according to the lines as the defendant says he understood they were to be run, and not having offered to release him against any further claim, is not entitled to a decree according to the allegations of the defendant. *Richardson v. Godwin*, 229.

AMENDMENT.

Vide Practice, 2, 4, 5.

ANSWER—EFFECT OF.

An answer, when directly responsive to the allegations of the bill, or to an interrogatory put in the bill, or on a special examination, is to be taken as true, unless it be proved not to be true by the oath of two witnesses, or of one witness with corroborating circumstances equal to the force of another witness, or by some other kind of evidence which is entitled to the weight of two witnesses on oath. *Hill v. Williams*, 242.

Vide Injunction, 11, 12, 13, 14, 15.

ATTACHMENT.

A distributive share in the hands of an administrator, due the wife of a nonresident debtor, cannot be subjected to the payment of the husband's debts in this State, by means of an attachment, in equity, under the statute, Rev. Code, chap. 7, sec. 20. *McLean v. McPhaul*, 15.

Vide Fraudulent Conveyance.

AVOIDANCE—MATTER IN.

Vide Injunction, 15.

APPEAL.

Vide Clerk and Master.

ASSETS.

Vide Following Money, 2.

AWARD.

Vide Specific Performance, 2.

BOND TO MAKE TITLE.

Vide Injunction, 9; Specific Performance, 3.

BOND TAKEN BY ORDER OF COURT.

Where a bond was taken from a trustee under an order of the court of equity, payable to the clerk and master, conditioned for the performance of the trust, it was *Held*, that the representative of the *cestui que trust* had no right to sue on such bond without the leave of the court of equity, and that where such unauthorized suit had been begun, the court would enjoin it until an account of the trust could be taken. *Floyd v. Gilliam*, 183.

BOND OF INDEMNITY.

A bond to indemnify the surety of A against all notes, bonds, etc., signed and entered into for B, extends to notes, bonds, etc., signed and entered into for B & Co. *Quickel v. Henderson*, 286.

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BONDS, NOTES, ETC.—WHETHER TO BE SOLD.

Where a testator bequeathed certain of his property, specifically, and then provided, “the balance of my estate to be sold and the proceeds divided among my children hereinafter named,” it was *Held*, that the bonds, notes and accounts due the testator, and the cash on hand, were not embraced by this clause. *Scales v. Scales*, 163.

CLERK AND MASTER.

A clerk and master in equity is no such party to a suit pending in his court as to entitle him, under the fourth chapter, twenty-third section, of the Rev. Code, to appeal from an interlocutory order appointing another than himself a commissioner to sell real estate. *Green v. Harrison*, 253.

COLLATERALS—REPRESENTATION AMONG.

Vide Distributees.

CONFIDENTIAL AGENT.

Vide Injunction, 6.

CONSIDERATION.

Vide Deed—Reformation of, 1, 2.

CONTRACTOR TO DO WORK.

Vide Injunction, 8.

CONTEMPT OF COURT.

Where a bill was filed for the settlement of copartnership dealings, and there is a prayer for an injunction against a bond given on a partial settlement of the business between the partners, but no injunction was issued, it was *Held*, that the obligor, in said bond, was not in contempt of the court of equity in refusing to submit to a judgment on the bond in a court of law. *Long v. Clay*, 350.

CONTINGENT REMAINDER.

1. A bequest of slaves to one, for life, with a limitation over to his or her children *equally to be divided*, is not controlled by the rule in Shelly's case, but confines the interest of the first taker to his or her life. *Chambers v. Payne*, 276.
2. Where children take as a class at the expiration of a life estate, each child takes a vested interest at its birth, subject to be partially divested in favor of the other children of the class as they are born, and upon the death of one of the children during the existence of the life estate, his or her interest goes to his or her representative, and not to ulterior limitees dependent on the first taker's dying without issue. *Ibid*.
3. The word “when,” like the words “at” and “if,” applied to a legacy of personalty, makes the gift contingent; but the superaddition of the words, “equally to be divided” (where there are several legatees), shows that the words, *when, etc.*, were only used to designate the time when the enjoyment of the legacy was to commence, and would not prevent it from vesting. *Sims v. Smith*, 347.

CONTINGENT INTEREST.

Vide Administrator Durante Minoritate; Death of Slaves Sued for.

CONTINUANCE.

Vide Practice, 8.

CONTRIBUTION.

Vide Copartnership Funds.

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CONTRACT—BILL TO RESCIND.

A bill, which seeks to rescind a contract in part, without restoring the opposite party to the condition he occupied previously to plaintiff's connection with him, is radically defective. *Martin v. Cook*, 199.

COPARTNERSHIP FUNDS.

Where one of a copartnership, by any means, gets a fund belonging to the firm, he is not at liberty to appropriate it to his own exclusive benefit, but must share it with his copartners. *Eason v. Cherry*, 261.

CORPORATION—DISSOLUTION OF.

Upon the dissolution of a corporation by the expiration of the time for which it was chartered, its debts become extinct. *Malloy v. Mallett*, 345.

CORPORATORS—INDIVIDUAL LIABILITY.

Under a provision in an act of incorporation, "that the private property of the individual stockholders shall be liable for the debts, contracts and liabilities of the corporation," it was *Held*, that the responsibility on the individual stockholders is a secondary one, and that when the debts against the corporation became extinct by the expiration of its charter, the liability of the individual stockholders became extinct also. *Malloy v. Mallette*, 345.

COURT'S CONTROL OVER AN OFFICE BOND.

Vide Bond Taken by Order of Court.

COVENANT OF QUIET ENJOYMENT.

Vide Nonresident.

CREDITOR'S BILL.

1. Where a bill was filed, by a judgment creditor, against a trustor and his trustee, to have satisfaction of his judgment out of the resulting interest of the trustor, alleging that the debtor had not a legal title to any property whatsoever, and that the interest sought to be subjected was one which only could be reached in a court of equity, it was *Held*, not to be necessary to state that the plaintiff had taken out a *fi. fa.* on his judgment, and that the same was returned *nulla bona*. *Rountree v. McKay*, 87.
2. Where a bill was filed by a judgment creditor, to subject the resulting interest of the trustor in personalty, and it appeared that other judgment creditors, as well as plaintiff, had levied *fi. fas.* on the trustor's interest in the land conveyed in the deed of trust, it was *Held*, that such other judgment creditors were necessary parties to the bill. *Ibid*.

CROSS BILL.

Practice, 6.

DAMAGES—LIQUIDATED.

Where A sued B, on a contract about the getting of shingles, and a compromise was made in writing, to the effect that B should confess judgment for \$500, to be discharged within twelve months by the delivery of so many shingles at given prices, and a judgment was entered accordingly, it being admitted that the shingles were to be paid for when delivered, at the prices agreed on, it was *Held*, that the writing and the judgment were but an obligation to pay a penal sum, and the court directed that the judgment should stand as a security for the damages actually sustained. *Lloyd v. Whitley*, 316.

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DEATH OF SLAVES SUED FOR.

No suit, in equity, can be brought to follow slaves, limited in contingent remainder, in the hands of one claiming a present defeasible interest, after the slaves have died; they having died in the lifetime of the first taker. *Herndon v. Pratt*, 327.

DECLARATION OF TRUST.

There is, in this State, no statute which requires that the declaration of a trust, made at the time when the legal title to land or slaves passes to one, who agrees to hold in trust, shall be in writing. *Riggs v. Swann*, 118.

DECREE.

Vide Practice, 1.

DECREE FORMER AS A BAR.

A suit in equity seeking to set aside a deed, because of incapacity on the part of the bargainor, and fraud and imposition on the part of the bargainee, is not for the same matter as one alleging that a deed was intended to be only a contract to convey on payment of the purchase money, and was erroneously worded, because of the ignorance, mistake or fraud of the draftsman, and a plea alleging the matter of the former suit in bar of the second, was overruled. *Ray v. Scott*, 283.

DECREE FOR DISTRIBUTIVE SHARE IN ANOTHER STATE.

A decree for a distributive share in another State, was *Held*, not to be a bar to a recovery of a distributive share of property lying in this State. *Jones v. Gerock*, 190.

DECREE FOR DOWER IN ANOTHER STATE.

It was further *Held*, that a decree for dower in another State would be considered as confined to the lands situate in such other State, and as not embracing lands situated in this State. *Jones v. Gerock*, 190.

DEED—REFORMATION OF.

1. Courts of equity do not assume jurisdiction to reform deeds unless the transaction be based on a valuable or meritorious consideration. *Hunt v. Frazier*, 90.
2. Where A had loaned B, his brother, a sum of money, and taken a conveyance of a tract of land and some slaves as security for the repayment, and the two brothers came to an agreement that A should convey the property to D on certain trusts, to let B's wife and children live upon the land and enjoy it for the life of the mother, and then to be sold for the payment of A's debts, and the overplus to be paid to her children, it was *Held*, that the deed of trust was founded on a valuable consideration, and as such the court's power to reform its defects could be properly exercised. *Ibid*.

DEED OPERATING IN TWO CAPACITIES.

A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may operate and have effect in both characters, provided it has been duly proved and registered. *Johnston v. Malcom*, 120.

DEED—INCONSISTENT PROVISIONS OF.

Where slaves were conveyed to a *feme covert*, by a deed of gift, and the first clause of the conveyance passed the legal estate to her and the heirs of her body, it was *Held*, that a subsequent clause of the conveyance, restraining her husband from all control over said slaves, was inconsistent with the first clause and inoperative, and that the slaves vested in the husband *jure mariti*. *Smith v. Martin*, 179.

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DEED DECLARED A SECURITY.

1. Where there is no allegation of fraud, imposition, oppression or mistake, the court will not set up a parol agreement, and declare an absolute deed to be a mere security for money advanced. *Whitfield v. Cates*, 136.
2. Where a valuable consideration has been paid by the person to whom an absolute deed for slaves is made, the allegation of a parol trust in favor of a third party, forms no exception to the rule in courts of equity, in respect to declaring such a deed a mere security for money loaned. *Ibid*.

Vide Overreaching Contracts, 2.

DEED—DESTRUCTION OF.

Vide Partner—Secret, 1, 2.

DEPOSIT IN BANK.

A deposit in a bank is not to be considered as included among *debts* ordered by the will to be *collected* and invested for the benefit of a legatee, especially before a demand and refusal on the part of the bank, to pay. *Adams v. Jones*, 221.

Vide Following Money.

DISSOLUTION OF COPARTNERSHIP.

Vide Partner—Secret.

DISTRIBUTIVE SHARE.

Vide Attachment, Decree for Distributive Share, etc.

DISTRIBUTEES.

Under the statute of distributions in this State, Rev. Code, chap. 64, secs. 1 and 2, representation is not admitted among collateral kindred after a brother's and sister's children, and, consequently, uncles and aunts of an intestate take to the exclusion of the children of a deceased uncle. *Johnston v. Chesson*, 146.

DIVORCE.

Vide Alimony.

DOWER.

Vide Decree for Dower, Etc.

ELECTION.

Where a testator had an estate in land limited over to the defendant on his dying without issue, and he devised the said land to be worked for two years after his death for the payment of his debts, and in his will he gave valuable legacies to the defendant, which she elected to take, it was *Held*, that though the testator died without issue, yet the provision for the payment of the debts must be enforced. *Norfleet v. Slade*, 217.

EMANCIPATION BY WILL.

The act of 1860, chap. 37, preventing the emancipation of slaves by will, applies to the case of a will made before its passage, where the testator died subsequently thereto. *Mordecai v. Boylan*, 365.

EMANCIPATED—REFUSING TO BE.

Where a negro woman slave was willed to one for life, and then to be free, and such slave formally elected to remain a slave, it was *Held*, that the *status* of such woman, after such election, was fixed as from the testator's death, and that her offspring, born after that event, remained slaves, and that she and her offspring passed by a residuary clause of the will. *Clark v. Bell*, 272.

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EXECUTORS IN DIFFERENT STATES.

Where a testator, having estates in this and two other States, appointed an executor here and another residing in one of the other States, and provided that they should not be required to give security, and it appeared that the money in the hands of the executor, in this State, was not sufficient to pay the pecuniary legacies, it was *Held*, to be the intention of the testator that such executor was not required to prove the will abroad and collect money in the other States to pay the legacies in full, and that he must pay the money in his hands to the legatees *pro rata*, and that the testator intended the executor abroad to administer the assets in the other States. *Mordecai v. Boylan*, 365.

EXAMINATION OF DEFENDANT ON OATH.

Where, in a suit for an account, plaintiff obtained leave to examine defendant upon oath, before the master, and he was interrogated as to the items of plaintiff's account, it was *Held*, that defendant's answers were evidence for him, only so far as they were responsive to the questions, and that he could not, in this way, prove his charges against plaintiff. *Fleming v. Murph*, 59.

EXCEPTIONS TO A BILL.

Vide Pleading, Practice, 3.

EXECUTOR—BUYING TESTATOR'S PROPERTY.

Where an executrix procured an order of court to sell certain slaves, in which she was willed a life estate, upon a suggestion that such sale was necessary for the payment of the debts of her testator, and in a short time after the sale she took conveyances from the purchasers, for the same slaves, without ever having been out of possession, it being also made to appear that there were no debts of the estate unpaid at the time of the orders to sell, it was *Held*, that the executrix took nothing by her purchase, and should be declared a trustee for the remaindermen. *Joyner v. Conyers*, 78.

EVIDENCE.

Vide Examination of Defendant on Oath; Special Interrogatories.

FEME COVERT.

In order to create a separate estate in a *feme covert*, there must be words sufficient to raise a trust for her benefit. *Smith v. Martin*, 179.

Vide Deed—Inconsistent, etc.

FOLLOWING MONEY.

1. Where an agent deposited money in bank as an ordinary deposit, stating at the time that it was the money of his principal, but desired the officer to place the money to his credit on the books of the bank, alleging that he might have occasion to use it for the benefit of his principal, and the agent died shortly afterwards insolvent, it was *Held*, that the principal was entitled to the fund, and might follow the same in a court of equity. *Whitley v. Foy*, 34.
2. Where one takes a note of the estate from an administrator, *mala fide*, as, for instance, in payment of the administrator's own debt, he cannot hold the fund from the next of kin, or those who are entitled to be substituted in their place, unless the administrator was in advance for the estate. *Latham v. Moore*, 167.

FOREIGN MISSIONS—BEQUEST TO.

Vide Will—Construction of a, 15.

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FRAUD ON THIRD PERSONS.

A mortgagee having agreed with the wife of the mortgagor, that upon a part of his debt being satisfied, he would assign for her benefit, his interest in the debt, and the property mortgaged; and in pursuance thereof, having assigned the same to a third person, *Held*, that the assignee was entitled to enforce against the wife's legatees, an agreement, by which, at the time she was soliciting him to aid her in securing the benefits, she engaged that upon her death, her interest in the property mortgaged, should be subjected to pay the debts due to such assignee by the mortgagor. *Bowers v. Strudwick*, 288.

FRAUD.

Vide Following Money, 2; Injunction, 2.

FRAUD—STATUTE OF.

A memorandum or note of a contract may be signed by one in the name of his principal, so as to comply with the requisitions of the statute of frauds, without being thereunto authorized in writing. *Blacknall v. Parish*, 70.

Vide Declaration of Trust; Specific Performance, 1.

FRAUD IN THE FACTUM OF A DEED.

Vide Jurisdiction, 3.

FRAUD UPON MARRIAGE.

1. A conveyance, by a woman, after a marriage engagement, and upon the eve of its solemnization, is a fraud upon the rights of the intended husband and will not be upheld, unless it appear clearly and unequivocally, that the husband had full knowledge of the transaction and freely assented to it. *Johnson v. Peterson*, 12.
2. Where a woman, being under an engagement to marry, made, a week before the marriage, a voluntary secret conveyance of all her property, including slaves, to the defendant, a man of a slender means, who, after the marriage, took the slaves into his possession, and refused, on demand, to give them up, but claimed them as his own, under such conveyance, it was *Held*, that the husband was entitled to writs to restrain the defendant from removing the slaves out of the State, although no threat to do so was made to appear. *Ibid*.

FRAUDULENT CONVEYANCE.

Where a debtor conveyed all his property with an intent to defraud his creditors, and then left the State, it was *Held*, that a creditor could not maintain a suit in equity, to have his debt satisfied out of the property, under the statute, Rev. Code, chap. 7, sec. 20, his remedy being at law. *Smitherman v. Allen*, 17.

FREEDOM—ELECTION TO DECLINE.

Vide Emancipated—Refusing to be.

FUND FOR THE PAYMENT OF DEBTS.

1. Where a testator gave property, real and personal, specifically, and then devised and bequeathed all the "balance of his estate" to certain parties in general terms, and after making his will, the testator acquired property, real and personal, it was *Held*, that this after-acquired property fell into the residuum bequeathed generally, and that upon deficiency of funds provided for the payment of debts, the after-acquired personalty was first liable. *Knight v. Knight*, 134.
2. Personalty in the hands of an executor or administrator, whether bequeathed specifically or otherwise, is first liable to the payment of debts, unless specifically exempted, and the real estate belonging to the deceased, whether descended or devised, is not liable until the former is exhausted. *Ibid*.

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GUARDIAN—COMPENSATION TO.

Vide Guardian and Ward, 1.

GUARDIAN AND WARD.

1. A guardian is entitled to commissions on payments made for goods bought of a firm of which he was a member; but not on charges for board while his ward lived in his family. *Williamson v. Williams*, 62.
2. Where a guardian waited six months after the principal in a note, held by him as guardian, died insolvent, before he sued the surety, who also became insolvent before suit was brought, such surety, though much indebted, being, up to one month before his failure, in good credit, and failed suddenly, the guardian having opportunity all the time of knowing the true condition of the obligors, it was *Held*, that by his laches he made himself responsible for the loss of the debt. *Ibid*.
3. Where it appeared that the property, in this State, of a ward residing in another State, consisted of good bonds, at interest, in the hands of his guardian here a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other State. *Douglas v. Caldwell*, 20.

HUSBAND AND WIFE.

Vide Fraud Upon Marriage; Jurisdiction, 4, 5; Overreaching Contracts, 1; Wife's Interest in a Distributive Share.

IDENTITY OF CAUSES OF ACTION.

Vide Decree Former as a Bar.

IMPOTENCY.

Impotency in a husband does not render a marriage by him void *ab initio*, but only avoidable by sentence of separation, and until such sentence, it is deemed valid and subsisting. *Smith v. Morehead*, 360.

IMPROVEMENTS.

Vide Specific Performance, 4.

INDEMNITY.

Vide Bond of Indemnity.

INDEMNITY.

Vide Corporators, etc.

INFANT'S ESTATE DISPOSED OF BY FRIENDS.

Where the friends of an infant made an exchange of his slaves for others, and those received in his behalf were carried off by his friends and sold, and he afterwards, without taking any benefit from the arrangement, repudiated it, and recovered in trover for those belonging to him, a court of equity will not interfere to restrain his execution, with the view of compelling him to return the slaves received on his behalf or account for their value. *Yarborough v. Yarborough*, 209.

INJUNCTION.

1. Where the defendant, in his answer, admitted that a cause was referred (no pleas having been entered), and that the reference was stricken out without notice to the other party, and the cause was submitted to a jury, and a judgment obtained against him without his knowledge,

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INJUNCTION—*Continued.*

- the court refused to dissolve an injunction granted to restrain the collection of the same. *Myers v. Daniels*, 1.
2. Where both parties to a trade for the sale of slaves had full time for deliberation, and the deeds were executed without secrecy, and attested by a respectable witness, and there was no evidence of mental incapacity, and no sufficient proof of a gross inadequacy of price, it was *Held*, that the transaction should be sustained. *Carman v. Page*, 37.
 3. Gross inadequacy of price is not sufficient, in itself, to set aside a deed, although it is a strong circumstance, tending with others, to make out a case of fraud or imposition. *Ibid.*
 4. Whenever it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere or the water of wells or springs, a court of equity will grant injunctive relief. *Clark v. Lawrence*, 83.
 5. Where a bill was filed, praying to have a nuisance abated, and for an injunction to restrain the defendant from erecting it in future, and the complained of was of the character of a nuisance, but the testimony was not sufficient to satisfy the court that it amounted to a nuisance in the particular case, the court directed an issue to be tried in the superior court, to determine the fact. *Ibid.*
 6. Where dealings between a father-in-law and his son-in-law, wherein the latter had been the other's agent, were closed in a hurried manner, and a note given by the father-in-law at the importunate solicitation of the son-in-law, on calculations made by him, under a promise that the whole settlement should be open to subsequent examination, and the answer to specific allegations of errors was unfair and evasive, it was *Held*, that an injunction to restrain a judgment at law on such note should be continued to the hearing, and that the judgment should stand as security for whatever might be ascertained to be due. *Hadley v. Rountree*, 107.
 7. Except to stay waste or prevent some irreparable injury, the writ of injunction is only issued as ancillary to some primary equity, which the bill seeks to enforce. *Eborn v. Waldo*, 111.
 8. Where it appeared that a contract made with a corporation to do certain work, was fulfilled to the satisfaction of the board of directors managing the concerns of the corporation, and that such work was done on favorable terms, and was beneficial to the company, it was *Held*, that a court of equity would not, on the allegation of one of the corporators that there was a secret agreement between one of the directors and the contractor to divide the profits, enjoin the payment of the stipulated compensation. *Havens v. Hoyt*, 115.
 9. A bill will not lie at the instance of the heirs, against the administrator of one who had executed bond to make title, to enjoin the latter from making a deed to the obligee, upon the ground that he had not paid the purchase money, but fraudulently pretended to have done so, and to nullify the contract. It would be the duty of the administrator, if the money, in such a case, was not collected, to enforce the payment, and he would be liable if he failed to do so. *White v. Hooper*, 152.
 10. Where one, who had only a life estate in land, made a deed for a fee simple, and the deed contained a warranty in fee, and the vendee, knowing of the defect in the title, gave his notes for the purchase money, upon which judgments were obtained, it was *Held*, that a court of equity would not interfere by injunctive process to restrain the collection of any part of these judgments, but would leave the

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INJUNCTION—Continued.

vendee to his action on the warranty, it appearing that the warrantor was solvent. *Henry v. Elliott*, 175.

11. In the case of a common injunction, where the answer is full, and the plaintiff fails to prove his allegations by any admission in the answer, being without proof, his injunction must be dissolved. *Mims v. McLean*, 200.
12. In a case of a common injunction, where the answer is full and responsive to the bill, and the equity is not confessed, but denied, the injunction must be dissolved. *Jones v. McKenzie*, 203.
13. Where the obligee, in a bond for title, paid a material portion of the purchase money down, and gave a note for the residue, and entered into possession and continued it up to the time of a suit in ejectment by the obligor, it was *Held*, to be a strong case for the court of equity to interfere by injunction, to prevent the obligee from being turned out, under the execution, in the suit at law. *Allen v. Pearce*, 309.
14. Where, to a bill for an injunction, the defendant answers lightly and evasively to material allegations, the injunction will not be dissolved. *Ibid*.
15. Where new matter is introduced in an answer, in avoidance of the plaintiff's equity, it will not be considered on a motion to dissolve. *Ibid*.

Vide Nuisance, Restraint on Sheriff, etc.

INTEREST—EXECUTOR'S LIABILITY FOR.

An executor is not liable for interest on money collected by him, unless he receives interest on the same. *Chambers v. Kerns*, 280.

INTEREST ON A LEGACY.

1. Interest on a legacy, as a general rule, is only chargeable from the time the legacy is ordered to be paid. *Ballantyne v. Turner*, 224.
2. Where money is given by will, as a portion to a child, or to one to whom the testator stood *in loco parentis*, or for whose support it was intended to make a provision, or where the legacy is demonstrative, and the fund is productive, it was *Held*, that the legatee is entitled to interest from the death of the testator. *McWilliams v. Falcon*, 235.
3. Where the legatees were children and grandchildren of testator's wife, and the assets out of which the pecuniary legacies were to be paid, were bearing interest, it was *Held*, that such legacies were entitled to draw interest from the testator's death. *Mordecai v. Boylan*, 365.

INTEREST AGAINST AN AGENT.

Where an agent withheld the notes of his principal from the administrator, which notes were of long standing, and large amounts of interest had accumulated, and being warned by the administrator that he would be held liable for interest on the accumulation unless he surrendered the notes, or had them renewed, it was *Held*, that he should be made liable so to account from the date of the filing of the bill. *Hill v. Williams*, 242.

IRON WORKS—BOUNTY TO.

1. Where a grant of 3,000 acres of land was made as a bounty under the act of 1788, in respect to a particular seat for iron works, it was *Held*, that such grant was appendant to the seat, and exhausted the bounty intended to be given by the statute; so that one who afterwards became owner of the seat, and rebuilt the works there, after the former works had gone down and were abandoned, had no right to another bounty in respect of such seat, and that a second grant for bounty in such a case was void. *The Attorney-General v. Osborn*, 298.

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IRON WORKS, BOUNTY TO—*Continued.*

2. Whether the requirements of the statute of 1788, Rev. Statutes, chap. 75, in regard to making the entry—its return to the county court, the order of survey and the appointment and report of a jury should be strictly complied with as a condition precedent to the issuing of a grant, or whether such matters are merely directory, and do not affect the validity of the grant—*Quere. Ibid.*
3. Whether a grant, which includes within its boundaries a large scope of country, say an area of ten miles by seven, but which in its face purports to be for 3,000 acres of vacant land, the excess being included in older patents is void—*Quere. Ibid.*

ISSUE SENT TO A COURT OF LAW.

Vide Injunction, 5.

JURISDICTION.

1. There is no ground for going into a court of equity to recover back damages assessed at law in behalf of a defendant to an action of replevin, upon the ground that the plaintiff has the title and has brought another action of replevin, but cannot recover back those damages in that or any other action at law. *Eborn v. Waldo*, 111.
2. That a note had been obtained by fraud in the *factum*, is a good defense at law, and cannot afterwards be brought forward for the purposes of an injunction. *Parton v. Luterloh*, 341.
3. It is no ground for a bill for an injunction, that the complainant was not a party to the suit at law because that process has not been served on him. His proper remedy is to have the judgment set aside, on motion, in the court granting it. *Ibid.*
4. The domicile of the husband draws to it the domicile of the wife; therefore, according to the 14th Rule of the 3d section of the 32d chapter of the Revised Code, where both parties are residing in this State, a bill, by the wife, for a divorce for the cause of impotency, must be brought in the county where the husband resides. *Smith v. Morehead*, 360.
5. As a general rule, an objection to the jurisdiction of the court of equity may be taken on demurrer when the facts appear upon the record. *Ibid.*

Vide Nonresident, etc.

LACHES IN GUARDIAN.

Vide Guardian and Ward, 2.

LEGITIMACY.

1. A child is, in law, legitimate, if born within matrimony, though born in a week or day after marriage. *Rhyne v. Hoffman*, 335.
2. A child begotten while the parties were man and wife, but not born until six months after the husband had obtained a divorce from the bonds of matrimony on account of the wife's adultery, will be taken to be legitimate, unless it be proved, by irresistible evidence, that the husband was impotent or did not have sexual intercourse with his wife. *Ibid.*
3. Where a man and woman live together as man and wife, and are so reputed in the neighborhood, up to the death of one of the parties, and have children which they treat as legitimate, a court will not declare against the marriage, except upon the most overwhelming proof that there was no marriage. *Jackson v. Rhem*, 141.

LEGACIES.

Vide Mistake of Fact.

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LEGACIES.

Vide Executors in Different States.

LEGACY TO A DECEASED PERSON.

A legacy to a granddaughter, who died before the will was made, is void.
Scales v. Scales, 163.

LEGACY AS A PORTION.

Vide Interest on a Legacy, 2.

LEGACIES—LEX LOCI AS TO.

The personal estate, which is in this State, of one residing in another State, in respect to both debts and legacies, must be administered by one qualified to act under the orders and control of our courts and according to our laws, but in regard to the payment of legacies and distributive shares, our courts, from comity, adopt the laws of the domicile. *Jones v. Gerock*, 190.

LEGACIES IN REMAINDER.

Vide Tax on Collaterals, 2.

LIMITATIONS TO ONE AND HIS REPRESENTATIVES.

A limitation by deed "to her and *her representatives*," can only mean to her executors and administrators. *McLaurin v. Fairly*, 375.

MARRIAGE SETTLEMENT.

Vide Overreaching Contracts, 1.

MISTAKE OF FACT BY A TESTATOR.

1. By the act of 1860, chap. 37, slaves attempted to be emancipated by will, go back to the next of kin, and not to the residuary legatee. *Mordecai v. Boylan*, 265.
2. Where a testator, in a codicil, gave as a reason for a legacy to a grandson, that *he had disinherited such grandson*, but the fact was, that he had not disinherited him, but had given him a large legacy in a clause of his will, it was *Held*, that the bequest, in the will, was not revoked by that of the codicil, but that the latter itself was void on account of the mistake, and *Held further*, that parol evidence, as to testator's feelings towards the legatee was admissible in the question of fact, as to the mistake. *Ibid*.

MISTAKE IN DESCRIPTION IN DEED.

Where land, which was sold to A under a mistaken description, was afterwards conveyed by the same owner to B by a proper deed, for a valuable consideration, without notice to B of the mistake, it was *Held*, that a bill to reform the former deed and correct the error would not lie against either A or B; but it appearing that A had got paid for part of the same land twice, he was not allowed to recover costs on the dismissal of the bill. *Sealey v. Brumby*, 295.

MONEY ARISING FROM PRIVATE SALE OF WIFE'S LAND.

Money arising by the sale of the wife's land by a deed executed by the husband and wife has none of the characteristics of real estate, and after the death of the wife, goes to the husband *jure mariti*. *Rouse v. Lee*, 352.

MULTIFARIOUSNESS.

A bill in equity, for a discovery and an account by one of two wards against one of two joint guardians, alleging that he had, exclusively, received the estate of the wards, in which bill the other guardian is made plaintiff, and the other ward defendant, is not multifarious. *Camp v. Mills*, 274.

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NONRESIDENT—SUIT AGAINST.

Where a plaintiff has a remedy at law on a covenant of quiet enjoyment, and brings a bill in equity against the covenantor on account of his nonresidence in the State, it is necessary for him to aver also, that the defendant has no property or effects in this State out of which satisfaction could be had upon his recovery at law. *Falls v. Dickey*, 357.

NUISANCE.

1. It is the general course of the court of equity, on applications to restrain private nuisances by injunction, to order an issue at law to ascertain the fact of the existence of such nuisance before the court will act. *Frizzle v. Patrick*, 354.
2. Where a party has no particular interest in an alleged nuisance from the ponding back of water, he cannot sustain a bill for an injunction, but must rely on the remedy by information in the name of the Attorney-General. *Ibid*.

Vide Injunction, 4, 5.

ORE TENUS OBJECTION.

Vide Practice, 5.

OVERREACHING CONTRACTS.

1. Where a woman and her intended husband, upon the eve of marriage, were induced by her brothers to sign a marriage contract, by which her property was to be conveyed to trustees in such manner as to deprive her not only of her right to dispose of the rents and profits thereof during coverture, but also of the right to dispose of the property itself, both during the coverture and afterwards, if she survived, and gave the ultimate remainder over after her death without issue, she being at the time advanced in life, it was *Held*, that such a contract, unless proved by the clearest testimony to have been fully understood and freely assented to by the intended wife, must be declared fraudulent as to her and inoperative as against the husband, except so far as it can be presumed that he freely assented to it. *Sanderlin v. Robinson*, 155.
2. Where one, having considerable influence over an old man, feeble in body and mind from a long course of intemperance, procured from the latter a deed for his land when he was without counsel, and in no condition to understand it, wherein was recited a large debt, which had no existence, and about which the grantee answered vaguely and evasively, it was *Held*, that although no confidential relation was proved then to exist between the parties, yet, that such deed, on the score of fraud and imposition, should be held only as a security for sums actually due. *Futrill v. Futrill*, 337.

PAROL PROOF TO SUPPLY A BOND FOR TITLE.

Where an insufficient description was given in a bond to make title, parol evidence cannot be resorted to, to show what the parties meant, or to identify the particular parcel of land which was the subject matter of the written contract. *Richardson v. Godwin*, 229.

PARTIES.

Vide Nuisance, 2; Practice, 5.

PAYMENT REPELLING A PRESUMPTION.

The payment of interest upon a mortgage debt within ten years before the filing of a bill to foreclose repels the presumption of payment or abandonment arising from the length of time. *Hughes v. Blackwell*, 73.

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PARTNERSHIP.

1. Where a partner, whose duty it is to keep the books, seeks to make a charge in his own favor, which is not supported by a proper entry in the books, he must account for that fact, and can only support the charge by clear proof; every presumption being against him. *Brown v. Haynes*, 50.
2. Where one entered into a copartnership with his son-in-law, and it was agreed that the father-in-law should furnish a house for a shop, tools, etc., and a house for the defendant to live in, and that he "should be at no expense," it was *Held* that these words must be intended to mean expense for things connected with the business, and not family expenses. *Ibid*.
3. One partner cannot, without the express concurrence of his copartner, make a note of the firm payable to himself and charge the firm therewith. *Ibid*.
4. Where A, who was the active partner and the bookkeeper of a firm, sought to charge it with the value of a slave, which, it was alleged, belonged to the firm, and had been appropriated by B, his copartner, to his individual use, it was *Held*, that in the absence of any charge upon the books of the firm, the mere allegation of it in his answer, supported by vague and improbable testimony that such slave belonged to the firm, was not sufficient. *Ibid*.
5. Where A, who was the active partner of a firm, and its bookkeeper, set up a claim against the firm for money which the answer alleged was due the partners jointly, for services rendered independently of the copartnership, but which were appropriated by B to his own use exclusively, it was *Held*, that this could not be made a charge upon the firm in the absence of proof that the money had been appropriated to the purposes of the firm, there being no entry on the books to show the fact. *Ibid*.

PARTNER—ACTIVE.

Vide Partnership, 1, 2, 3, 4, 5.

PARTNER—SECRET.

1. Where one was a partner in a firm in 1855 and 1857, but alleged that for 1856 he was not a partner, and that his withdrawal was evidenced by a deed which was lost, and it turned out that the deed had been destroyed by himself, and he answered delusively about it, and it appeared that he had acquiesced in certain acts of his partner, treating him as a partner, it was declared by the court that he was to be considered as a partner for the year 1856 also. *Clements v. Mitchell*, 171.
2. It was *Held*, by the court, that the destruction of the deed which it was admitted explained defendant's connection with the firm, and that, too, after he knew that it would be necessary to make such explanation, afforded a strong presumption that such deed committed him as a partner. *Ibid*.

PENALTY.

Vide Damages Liquidated.

PERPETUITY.

In determining whether a limitation of property does or does not amount to a perpetuity, regard is had to possible, not actual, events, and the fact that the gift might have included objects too remote is fatal. *Moore v. Moore*, 132.

PERSONALTY.

Vide Fund for Payment of Debts.

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POWER TO DISTRIBUTE AMONG CHILDREN.

Where a husband devised and bequeathed as follows, "I give and bequeath to my beloved wife, D. A, after the payment of my just debts, all my property, real, personal and perishable, to be hers in fee simple, so that she can have the right to give it to our six children as she may think best," it was *Held*, under the terms of the will, the testator's widow had the power to sell, at her discretion, any one part of the property for the payment of the debts of the testator, so as to release another part from such debts; and BATTLE, J., was strongly inclined to the opinion that she took an absolute interest in all the property. *Alston v. Lea*, 27.

PLEADING.

Where certain matters have been set forth in the answer, by the way of plea, and there has been replication to the answer, it is too late to except to the answer for insufficiency. *Worth v. Gray*, 380.

Vide Alternative Relief; Decree, etc., Multifariousness, Presumption of Abandonment, 3.

PRACTICE.

1. The orders and decrees of a court of equity are not necessarily absolute, but may be moulded and shaped to meet the exigence of each particular case. *Worth v. Gray*, 4.
 2. Where a bill was demurred to, which seemed to be deficient in equity, yet, as there were facts and circumstances incident to the matter disclosed which would have an important bearing on the case, some of which were not set out at all, and others but vaguely, and the amount involved was large, the court, without costs and without prejudice to the defendant's equity, overruled the demurrer in order that the plaintiff's bill might be amended. *Ibid*.
 3. The office of an exception is to call the attention of the court to some specific matter or item in an account in respect to which error is alleged; if it does not answer this purpose, the court will not notice it. *Brown v. Haynes*, 50.
 4. Where the plaintiff, in a suit, failed to file a replication to the answer, and the parties proceeded to take proofs in the cause, this was *Held*, a waiver by the defendant of a replication, and the court allowed an amendment under the 17th section of the 33d chapter of the Revised Code. *Fleming v. Murph*, 59.
 5. Where an objection, for the want of parties, was taken *ore tenus*, for the first time, on the argument of the demurrer in this court, which was deemed valid, the court refused, nevertheless, to dismiss the bill, but remanded it without costs to the court below, that it might be amended as to parties. *Rountree v. McKay*, 87.
 6. Where the defendant has a distinct equity, he must set it up by a cross-bill or by an original bill; but he cannot have the benefit of it by an answer. *Weisman v. Smith*, 124.
 7. Although a plaintiff may fail as to the principal equity he seeks to establish, he may fall back on a secondary equity, provided it is not inconsistent with the principal equity and the allegations in the bill are sufficient to raise it. *Whitfield v. Cates*, 137.
 8. A motion to dissolve an injunction may be continued for any cause the court may deem sufficient, even without a written affidavit. *Dillin v. Sessoms*, 256.
 9. After a cause is in this court and the party is ready to have it heard, a motion to dismiss for want of a prosecution bond will not be entertained. *The Attorney-General v. Allen*, 144.
- Vide Contempt of Court; Recusant Bidder; Sale for Partition, 2; Special Interrogatories.

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PRESUMPTION OF ABANDONMENT.

1. Where a husband having a right to receive satisfaction for, or release the equity of his wife, permitted a long time to elapse without bringing suit, during which time his adversary was in the open use of the property, claiming it as his own, it was *Held*, that a presumption of abandonment, release or satisfaction arose against the equity, which would be fatal, unless the delay was accounted for. *Worth v. Gray*, 5.
2. Whether ignorance of the claimant's right is sufficient to repel the presumption arising from the lapse of time—*Quere?* *Ibid*.
3. Whether where a bill by way of anticipation sets forth facts to repel the presumption of satisfaction, release or abandonment, which avers that in fact there was none, and the defendant pleads the statute of presumptions, it is necessary to support such plea by an answer to the plaintiff's allegations—*Quere?* *Ibid*.

Vide Payment—Repelling a Presumption.

PRE-EMPTION.

1. Whether a court of equity would interfere to compel a specific performance of a contract between two joint owners of land that neither should sell without first giving the other the refusal of it—*Quere?* *Weisman v. Smith*, 124.
2. A sale of a part of the interest of one, by the consent of both of two joint owners of land, as to which there was a right of pre-emption, without any provision as to its future exercise, justifies the inference that such right was intended to be abandoned. *Ibid*.
3. On the death of one of two joint owners of land, between whom the right of pre-emption existed, it was *Held*, that such right cannot be enforced specifically against the devisees of the deceased owner. *Ibid*.

PROCEEDS OF A FUND BEQUEATHED.

Vide Ademption of a Legacy, 1.

PROCESS—WANT OF SERVICE OF.

Vide Jurisdiction, 3.

PROSECUTION BOND.

Vide Practice, 9.

PURCHASE WITHOUT NOTICE.

Vide Mistake in Description.

REGISTRATION.

A deed of settlement, in trust for a wife and children, proved and registered three years after the date of its execution, was *Held*, to be valid as against creditors whose debts were contracted after such registration. *Johnston v. Malcom*, 120.

REFERENCE OF A SUIT PRIVATELY.

Where a cause was referred to arbitrators, no pleas having been entered, it was *Held*, that the reference was nothing more than a parol reference, and that the presiding judge had no power to have it stricken out. *Myers v. Daniels*, 1.

REMEDY—FAILURE OF, AT LAW.

Vide Jurisdiction, 1.

REMOVAL OF PROPERTY TO ANOTHER STATE.

Vide Guardian and Ward.

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REPLEVIN.

Vide Jurisdiction, 1.

REPLICATION—WAIVER OF.

Vide Practice, 4.

RESIDUARY CLAUSE.

Vide Fund for Payment of Debts.

RESTRAINT OF SHERIFF FROM PAYING OVER TAX MONEY.

Where a sheriff left his county for something over a month, on necessary business, with an intention of returning by a given time, it not appearing that he was insolvent, it was *Held*, that the fact of a deputy's having applied a portion of the taxes of a given year to a judgment against him (the sheriff) for the taxes of a preceding year, without being instructed so to do by the sheriff, was not a sufficient ground for the sureties of that year to have an injunction to *restrain the sheriff from paying the taxes of that year, otherwise than as the law directs*. *Mitchell v. Ward*, 66.

RECUSANT BIDDER.

Upon the refusal of a bidder at a sale of land by the master, under a decree of court, to comply with his bid, it is not proper, in the first instance, to order a resale of the land, and that the delinquent bidder pay the difference between the former and the latter sales. The proper course is for the master to report the facts to the court, and for the bidder to be put under a rule to show cause why he shall not comply with his contract. *In the Matter of Yates*, 212, and *Harding v. Yarborough*, 215.

Vide Sale for Partition, 2.

SALE BY COURT OF EQUITY.

Vide Recusant Bidder.

SALE FOR PARTITION.

1. Where it appeared that the title to land, sought to be sold for partition, was subject to be divested out of the petitioners, by the terms of an executory devise, which extended to it, it was *Held*, that the court could not order a sale of the premises. *McKay v. McNeill*, 258.
2. Where a court of equity is resorted to, for the sale of land, after the sale is ordered to be confirmed (by which the bid becomes *accepted*), if the master informs the court that the bidder refuses to comply with the terms of the sale, no order prejudicing the rights of the bidder can be made, until he is made a party to the proceedings, by the service of a rule upon him to show cause. *In the Matter of Yates*, 306.

SECONDARY EQUITY.

Where a bill is filed to have land sold for partition, but no actual partition is asked in the alternative, and no general relief prayed for, the court will not order such actual partition, though the parties might seem to be entitled to it, if the bill had been framed with such an aspect. *McKay v. McNeill*, 258.

Vide Practice, 7.

SEQUESTRATION.

Where the owner of a life interest in slaves, a demoralized and needy man, who had made a sale of all his property, enquired of a person whether he could be subjected, criminally, if he removed the slaves out of the

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SEQUESTRATION—*Continued.*

State, and intimated to another, after a suit was brought, that if he could get the slaves in his possession, the remainderman should never receive any benefit from them, it was *Held*, a proper case for writ of sequestration. *McNeill v. Bradley*, 41.

SETTLEMENT.

Vide Injunction, 6; Tax on Collaterals, 1.

SETTLEMENT—HOW FAR CONCLUSIVE.

Where it appeared that during a copartnership of eight years duration, there had been occasional calculations of interest and summing up of results and a division of profits, but no surrender of vouchers or cancellation of books, nor release, nor receipt in full, it was *Held*, that the transactions were not of such a conclusive nature as to bar an account. *Lynch v. Bitting*, 238.

SHERIFF'S POWER UNDER A FIERI FACIAS.

A sheriff has a right to sell any property of the debtor that is subject to the lien of his execution, and the fact that one has bought part of such property at private sale, *bona fide*, and paid the full value, and that enough of other property remained to satisfy the execution, and that the sheriff and purchaser had knowledge of this purchase, but were benefited in the sale of this particular property, and made it from such motive, could raise no equity against the sheriff or purchaser. *Bevis v. Landis*, 312.

SPECIFIC CHARGE ON PROPERTY.

1. Where a testator directed a pecuniary legacy of \$1,500 to be paid to his wife by his executor "out of my estate," for a certain purpose, and by a codicil reduced the amount to \$750, "to be paid by my executors,*" it was *Held*, that the terms of the codicil did not annul the force of the words, "out of my estate," contained in the will. *Biddle v. Carraway*, 95.
2. Where a testator, after bequeathing certain property for the payment of his debts, gave the residue of his property in specific devises and bequests, and then bequeathed general pecuniary legacies with the direction "to be paid by my executors out of my estate," and the fund provided for the payment of debts proved insufficient for the purpose, it was *Held* (PEARSON, C. J., *dissentiente*), that the pecuniary legacies were a charge upon the specific ones, and the latter must be exhausted before the former could be touched. But whether they were a charge on the land specifically devised—*Quere?* *Ibid*.
3. Personal property, which a testator has given away in his lifetime, and which does not need the aid of his will to pass the title to it, does not abate the payment of debts; where there is a deficiency of assets, although the testator confirms the gift in his will. *Ibid*.

SPECIFIC PERFORMANCE.

1. Where a paper writing was signed and sealed by the owner of land, with blanks as to the name of the bargainee and left with an agent, who was authorized, by parol, to fill up the blanks with the name of the purchaser and the price, it was *Held*, that though such an instrument could not operate as a deed, yet, it was a contract for the sale of land, signed, for the person to be charged therewith, by his lawfully authorized agent, and could be specifically enforced. *Blacknall v. Parish*, 70.
2. Where a dispute existed between the owners of contiguous lands as to their dividing lines, and it was agreed, in writing, to submit the matter to arbitration, and to *stand to and abide by such lines* as

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SPECIFIC PERFORMANCE—*Continued.*

- should be *made and laid down by the referees*, and the arbitrators made an award designating dividing lines between the parties, which the recusant party failed to show were erroneous, it was *Held*, a proper case for the court to decree a specific performance. *Thompson Deans*, 22.
3. The remedy of the heirs at law, in a case where the obligee had not paid the purchase money on a bond to make title, would be to file a bill against such obligee to compel a specific performance. *White v. Hooper*, 152.
 4. Where the answer to a bill for a specific performance of a parol contract to convey land, and in the alternative for compensation for improvements, denies the terms of the contract as set out in the bill, and alleges a different one, which was not performed on account of the improper conduct of the plaintiff, and the defendant also insists on the statute of frauds, it was *Held*, that the plaintiff was not entitled to compensation for value added to land by such improvements. *Sain v. Dulin*, 195.
 5. The maxim, that equity will not enforce the specific performance of an agreement, upon which an action will not lie, at law, for damages, never meant more than that the contract must be such as the law would have recognized, if sued on in proper time and under proper circumstances. *White v. Butcher*, 231.
 6. One who has executed a bond to make title to land, has no right to insist, in a suit for a specific performance, that the defendant had abandoned his right to relief, while he still holds the bonds given for the purchase money, and has never made an offer to surrender them to his vendee. *Ibid.*

SPECIAL INTERROGATORIES.

Where a plaintiff in his bill makes direct charges, and calls upon the defendant by special interrogatories to make discoveries as to those charges, the answer, directly responsive to such interrogatories, becomes evidence for the defendant, as well as against him, notwithstanding that a replication to the answer had been put in. *Hughes v. Blackwell*, 73.

STATUTE OF LIMITATIONS.

1. After the death of one of the members of a copartnership, the statute of limitations begins to run in favor of his personal representative against a claim to have an account of profits received by him. *Weisman v. Smith*, 124.
2. Where slaves, limited in remainder on a contingency, were sold under an execution against one claiming a present, absolute interest, it was *Held*, that the purchaser under such execution, who took possession and held them for more than three years, got title by the statute of limitations. *Herndon v. Pratt*, 327.
3. Where the statute of limitations is a bar to a trustee, it is also a bar to the *cestui que trust*, for whom he holds the title. *Ibid.*

Vide Trust Fund in Hands of Husband.

STOCK IN A RAILROAD COMPANY.

Stock in a railroad company is embraced in the term, *property*, directed by the will to be sold. *Adams v. Jones*, 222.

TAX ON COLLATERALS.

1. The 8th section of the 99th chapter of the Revised Code, which directs the tax on legacies to strangers in blood, imposed by the preceding section, to be retained by the executor or administrator "upon his

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TAX ON COLLATERALS—*Continued.*

settlement of the estate," and directs the tax to be paid into the clerk's office, has reference to his settlement with the individual to whom the legacy is bequeathed, and not to the final settlement of the estate, and the tax must be paid into the office on the settlement with the legatee. *Attorney-General v. Allen*, 144.

2. A legacy in remainder to collateral kindred is liable to the tax imposed by the act of 1846, chap. 72, and the proper mode of suing for such tax is by a bill in equity, in the nature of an information, in the name of the Attorney-General. *Attorney-General v. Pierce*, 240.

TRUSTEES.

Vide Creditor's Bill, 2.

TRUST FUND—FOLLOWING A.

1. Where the agent of a trustee received money, arising from the sale of trust property, made by collusion with him, it was *Held*, not to be a defense to a bill against such agent to follow the funds in his hands, that he had paid the money over on liabilities which he had incurred for the trustee. *Bennett v. Merritt*, 263.
2. Where trust property is wrongfully sold by a trustee, by collusion with another, who did not, however, receive any part of the price for which the property was sold, it was *Held*, that the principle of following a fund in its converted state, does not apply. *Ibid.*

Vide Trust Fund in the Hands of a Husband.

TRUST FUND IN THE HANDS OF A HUSBAND.

Where a bill set forth that certain slaves were sold at auction by an administratrix, and a bill of sale made to B, the purchaser, but it was agreed that he should hold the property, in trust, to indemnify himself against certain debts, in which he was surety for the intestate, and he paid no money; that the debts remained unpaid for nine years, and that in the meantime B married the administratrix, and took with her the slaves in question, it was *Held*, that these allegations were sufficient to make out a case against B as succeeding to the trust his wife was under to distribute, and having the legal estate by the bill of sale, the property could be followed in his hands, and *Held further*, that the statute of limitations did not run against the distributees. *McLaurin v. Fairley*, 375.

TRUSTEES PURCHASING TRUST PROPERTY.

Where the trustee of an insolvent debtor, under a deed of trust which left out certain creditors, bought property at his own trust sale, at less than its value, but without any actual fraud, in a suit by the unsecured creditors to compel a resale of the property for their benefit, it was *Held*, that such trustee was entitled to have *bona fide* debts due him from the trustor satisfied out of the increased price obtained by a resale of the property before the unsecured creditors could come in. *Elliott v. Pool*, 42.

TRUST—PAROL.

Vide Deed Declared a Security, 2.

TENANT FOR LIFE AND REMAINDERMAN, HOW ENTITLED TO DAMAGES.

Damages assessed against a railroad company, on the condemnation of land to the use of the company, belong to the tenant for life and remainderman, in proportion to the period for which each suffers the encumbrance. *Joyner v. Conyers*, 79.

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WARRANTY—SUIT ON.

Vide Injunction, 10.

"WHEN" AND "IF"—HOW INTERPRETED.

Vide Contingent Remainder, 3.

WIDOW RESIDING IN ANOTHER STATE.

1. Where one residing in another State made a will, which was not satisfactory to his widow, who duly entered her dissent on its being offered for probate in that State, and also entered her dissent when it was offered for probate in this State, it was *Held*, that she is entitled to dower and a distributive share of property lying in this State. *Jones v. Gerock*, 190.
2. The widow of one domiciled in another State, who died intestate, seized and possessed of lands in this State, is entitled to her dower in such lands. *Ibid*.

WIFE'S INTEREST IN A DISTRIBUTIVE SHARE.

Where a husband and wife brought suit in a court of equity for the distribution of a fund limited to them and others by deed, as joint owners, and after an interlocutory decree for an account, but before the account was taken, the husband died, it was *Held*, that the wife, surviving, was entitled to the fund. *Tatham v. Wilson*, 250.

WILL—CONSTRUCTION OF.

1. Where a testator bequeathed as follows, "I lend to my wife, during her life, all my negroes (three in number) for the purpose of raising and educating my two sons," which was but a reasonable share of her husband's estate, and gave in the same will, in appropriate terms, to his wife, as guardian to his two sons, the remainder of his estate, it was *Held*, that the former clause conferred upon her for life a beneficial interest in said property, with a recommendation in behalf of the two sons. *Mason v. Sadler*, 148.
2. Where a testator in his will gave a slave to one of his sons, and then provided that should he sell such slave, the proceeds should go into a common fund; and afterwards, by a codicil made a contingent limitation of the same slave to a daughter in the event of the former legatee's dying without leaving children, and further provided that if any of the slaves bequeathed to the daughter, should be sold by him, their value should be made good to her out of his estate, it was *Held*, that the said slave having been sold by the testator, the daughter had no claim for its proceeds out of the estate. *Tillman v. Tillman*, 206.
3. Where a testator had derived certain slaves from his maternal grandfather, who had lived in the county of Martin, and it appearing to be a leading purpose with him to restore such slaves to their original place of residence, and to their family connections, he bequeathed to one in Martin as follows: "All my negroes on my Roanoke plantation (which laid in the county of Martin), also, all my negroes on my Edgecombe farms, which I got from Martin County, whether I inherited or purchased them," it was *Held*, that slaves bought by the testator in Martin or elsewhere, and removed from that county to Edgecombe, and the children born in Edgecombe of women removed from Martin, and one born of a woman on the Roanoke plantation, but which was casually residing elsewhere, all passed under said bequest. *Norfleet v. Slade*, 217.
4. Where there were two persons of the same name, mentioned in a will, the one a granddaughter, to whom a small legacy was given, and the other a daughter, to whom a larger portion is given in a clause with two others, daughters, it was *Held*, that the daughter was meant in such bequest. *Ballantyne v. Turner*, 224.

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WILL, CONSTRUCTION OF—*Continued.*

5. The words, "wheat and corn on hand," in a will, were *Held* to mean that only which was in the granaries of the testator at the time of his death, and not to embrace the ungathered or standing crop. *Adams v. Jones*, 221.
6. Where a testator gave directions in his will, that his wife should "put out his money and take security for it," it was *Held*, that the executor was not bound or authorized to interfere with the widow in the investment and management of the fund. *Ibid.*
7. A wish expressed at the conclusion of a will, that if the testator had not provided his wife with a plentiful support, she was to have enough of the interest of his money to make her such plentiful support, was *Held*, too vague and indefinite to impose any duty on the executor. *Ballantyne v. Turner*, 225.
8. However deeply impressed the court may be as to a testator's particular intention, if he has been grossly negligent in setting forth his purpose, and to declare such to be his intention, would require the court to ignore the principles which have been adopted to give effect to the intentions of testators, such declaration will not be made. *Gillis v. Harris*, 267.
9. *Grandchildren* and *great-grandchildren* cannot be included in the division of a residue directed to be made among *children*. *Mordecai v. Boylan*, 365.
10. Where a bequest was made, to the children of a brother and sister of the testator, to which is added, "that is, on the supposition that my brother is dead; but if he is alive at the time of my death, then he is to receive one-half of my estate," it was *Held*, that no question as to whether the estate was to be divided, according to *heads* or *stocks*, could arise, for that the brother took one-half of the estate, and his children nothing. *Chambers v. Reid*, 304.
11. Whether the word "wish," in a will, was intended to create a trust, discussed. The case was decided upon the peculiar phraseology of the will. *Cook v. Ellington*, 371.
12. A testator, in contemplation of a certain contingency, provided that thereupon an estate, consisting of realty and personalty, should be divided into four parts, and distributed as follows: "One each to a brother and a sister, and their heirs"; "One part to my other lawful heirs, and the fourth part to foreign missions, to be paid over to the treasurer of that board, to be appropriated to that purpose." By another clause, he provided that, "If there should be any property, either real or personal, not given away heretofore, it is to be equally divided between all my lawful heirs." The brother and sister survived the testator, but died before the happening of the event contemplated. Upon the happening of that event:
13. *Held*, (1) That the two shares first mentioned descended—the realty to the *heirs*, and the personalty to the *personal representatives* of the brother and sister respectively. *Hackney v. Griffin*, 380.
 (2) That the third share belonged to such as were heirs of the testator *as to realty*, excluding the heirs of the brother and sister first mentioned. *Ibid.*
 (3) That the share devised to foreign missions, having lapsed on account of the ambiguity of the clause which contained it, fell into the residue, and descended upon all those who were heirs of the testator *as to realty*. *Ibid.*

Vide Bonds, Notes, etc., Whether to be Sold; Partnership, 2; Power to Distribute; Stock in a Railroad.

